80-827

Supreme Court, U. S.
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No.

In the Supreme Court of the United States

October Term, 1980

ROBERT SCANLON, Secretary of Education of the Commonwealth of Pennsylvania,
Petitioner

v.

PATRICIA SUE BATTLE, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE QUESTION PRESENTED

Whether petitioner's refusal to provide handicapped children more days of education than are provided to non-handicapped children—180 days—violated The Education For All Handicapped Children Act, when petitioner does offer all handicapped children 180 days of education and services designed to meet their needs and to allow them to benefit from their educational experience.

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This matter arises from three class actions which were consolidated for trial and appeal. While three separate judgment orders were entered in the District Court, only a single judgment was entered in the Court of Appeals. The following is the caption of the matter in the Court of Appeals which lists all of the parties before that Court.* This petition is submitted only on behalf of Robert Scanlon, Secretary of Education, Commonwealth of Pennsylvania, Department of Education.**

* In addition, while listed in the caption, the Commonwealth of Pennsylvania was dismissed as a party to all three cases by the District Court.

** Robert Scanlon succeeded Caryl Kline as Secretary of Education in January of 1979.

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 79-2158, 79-2188,79-2189,79-2190, 79-2568, 79-2569, 79-2570

PATRICIA SUE BATTLE, by her parents and next friend JUNE E. BATTLE and DONALD E. BATTLE and JUNE E. BATTLE and DONALD E. BATTLE in their own right, on behalf of themselves and all others similarly situated

v.

COMMONWEALTH OF PENNSYLVANIA, CARYL M. KLINE, Secretary of Education, Commonwealth of Pennsylvania, Department of Education

THE ABINGTON SCHOOL DISTRICT, DR. CARL B. HOFFMAN, Superintendent of the Abington School District

THE WOODS SCHOOLS, DR. HAROLD S. BARBOUR, President of the Woods Schools

(D.C. Civil No. 78-0132)

BERNARD, NATALIE, a minor, by her parents and natural guardians BERNARD, CLARA M. and BERNARD, ROBERT A. in their own right, on behalf of themselves and all others similarly situated

v.

COMMONWEALTH OF PENNSYLVANIA, KLINE, CARYL, SECRETARY OF EDUCATION, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION,

THE MARPLE NEWTOWN SCHOOL DISTRICT, SANNER, GLENN Superintendent of the Marple Newtown School District,

ELWYN INSTITUTE, CLARD, DR. GERALD R., President of the Elwyn Institute

(D.C. Civil No. 78-0133)

ARMSTRONG, Patricia and John individually and on behalf of their minor child, GARY ARMSTRONG and NORMA H., individually and on behalf of her minor child, RICHARD H., on behalf of themselves and all those similarly situated

v.

KLINE, Caryl, Secretary of Education of the Commonwealth of Pennsylvania, individually and in her official capacity.

THE SCHOOL DISTRICT OF PHILADELPHIA, MICHAEL MARCASE, individually and in his official capacity as Superintendent of the School District of Philadelphia and

ARTHUR W. THOMAS, MRS. EDWARD OBERHOLTZER, AUGUSTUS BAXTER, MRS. LAWRENCE BOONIN, ROBERT SEBASTIAN, MRS. MICHAEL STACK, GEORGE PHILIP STAHL, JR., and DR. NICHOLAS TROLIO, individually and in their official capacities as members of the Board of Education of the School District of Philadelphia

(D.C. Civil No. 78-0172)

Marple Newtown School District, a defendant in D.C. Civil No. 78-0133,
Appellant in No. 79-2158

Caryl Kline, a defendant in D.C. Civil Nos. 78-0132, 78-0133 and 78-0172,
Appellant in No. 79-2188

Abington School District, a defendant in D.C. Civil No. 78-0132,
Appellant in No. 79-2189

School District of Philadelphia, Michael Marcase, Arthur W. Thomas, Mrs. Edward Oberholtzer, Augustus Baxter, Mrs. Lawrence Boonin, Robert Sebastian, Mrs. Michael Stack, George Philip Stahl, Jr., and Dr. Nicholas Trolio, defendants in D.C. Civil No. 78-0172,
Appellants in No. 79-2190

Robert Scanlon, a defendant in D.C. Civil Nos. 78-0132, 78-0133, 78-0172,
Appellant in Nos. 79-2568, 79-2569 and 79-2570

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert Scanlon, Secretary of the Department of Education, Commonwealth of Pennsylvania, hereby petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on July 15, 1980. Rehearing was denied on August 22, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

I. OPINIONS OF THE COURT BELOW

The opinions of the Court of Appeals, reproduced at 80a to 124a, are not yet reported.

The opinion and order of the District Court is reported at 476 F. Supp. 583 (E.D. Pa. 1979) and is reproduced at 1a to 54a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1980. Rehearing was denied on August 20, 1980.

III. STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory provisions relevant to this petition are set forth verbatim in the Appendix hereto:

The Education For All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* (1976):

Section 1401. Definitions

Section 1411. Entitlements and allocations

Section 1412. Eligibility requirements

Section 1413. State plans

Section 1415. Procedural safeguards

Section 1416. Withholding of payments; judicial review

IV. STATEMENT OF THE CASE

These three class actions were commenced in January 1978, by five handicapped school-aged persons who alleged that, because of the nature and severity of their handicapping conditions, they required a program of special education and related services in excess of 180 days per year. Prior to the decision in this case, the Commonwealth of Pennsylvania funded public education for all school-aged children, including handicapped children, in an amount calculated and intended to fund only 180 days of educational programming.

Plaintiffs sought to enjoin Caryl Kline, then Secretary of Education,[1] and various officials of the Philadelphia, Marple-Newtown and Abington School Districts to provide to them, and all those similarly situated, a program of free special education and related services extending more than 180 days and, in some cases, a full 365-days per year. Plaintiffs based their claim on the Due Process and Equal Protection Clauses of the Fourteenth Amendment, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, the Education For All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* and state law. By order dated March 16, 1979, the Court ordered that the three cases be consolidated (4a-5a).

On June 21, 1979, after trial, the District Court issued its ruling, holding that the Commonwealth's 180-

[1] Defendant Scanlon succeeded Kline as Secretary of Education in January 1979.

day rule violated the Education For All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* (hereinafter the "Act").[2] *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979) (hereinafter *"Armstrong"*). In so ruling, the District Court found that "[t]he congressional intent [in enacting the Act] was to provide for that education which would leave these [handicapped] children, upon school's completion, as independent as possible from dependency on others, including the state, within the limits of the handicapping condition." *Id.* at 604 (48a). Having already concluded that the 180-day rule precluded some handicapped children from attaining that degree of self-sufficiency which they could otherwise achieve, *id.* at 600 (36a-37a), the Court enjoined defendants from refusing "to provide or fund the provision of a program of special education and related services in excess of 180 days per year to any handicapped child who is a member of the class. . . ."[3] (52a-54a).

On July 5 and July 17, 1979, the Court entered orders enjoining defendants to maintain the named plaintiffs in specified programs unless or until certain due process procedures are completed (55a, 57a). By subsequent orders dated August 1, 1979 and September 5, 1979,

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[2] The Court found it unnecessary to reach plaintiffs' other statutory and constitutional claims.

[3] By order dated February 21, 1979, the District Court had granted plaintiffs' motion for certification of a class action and certified a class composed of:

> All handicapped school aged persons in the Commonwealth of Pennsylvania who require or who may require a program of special education and related services in excess of 180 days per year and the parents or guardians of such persons.

(4a-5a).

the Court entered orders enjoining defendants to take specific actions to provide the benefits of its holding to the remaining members of the class (59a, 63a).[4] Finally, on September 5, 1979, the Court entered orders of final judgment in each of the cases (77a-79a).

The order of June 21, 1979 and each of the subsequent orders were appealed by one or more of the defendants. However, because of pending motions to clarify, alter or amend filed by plaintiffs,[5] the Court of Appeals took jurisdiction, under 28 U.S.C. §1292(a)(1) (1976), only over the injunctive orders of the lower court. *Battle v. Kline,* 79-2158, 79-2188-90, 79-2568-70 (3d Cir. July 15, 1980), slip op. at 5 (hereinafter *"Battle"*) (85a).

The Court of Appeals issued an order on July 15, 1980, per Judge Hunter with Judge Van Dusen concurring and Judge Sloviter concurring and dissenting, remanding these actions to the District Court for further proceedings consistent with the Opinion of the Court of Appeals (128a). In so doing, the court apparently agreed with the District Court that an inflexible "180-day rule" violated the Act, but rejected most of the trial court's reasoning.

Specifically, the Court of Appeals rejected the District Court's finding that the Act establishes educational goals such as maximization of self-sufficiency. *Battle, infra* at 17, 24 (98a, 105a-106a). Instead, recognizing that "[t]raditionally, decisions of educational policy and

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[4] Among other things, the order of September 5, 1979, established a standard to be applied in determining whether any given child requires more than 180 days of education (64a).

[5] Plaintiffs filed motions to clarify, alter or amend the orders of June 21, 1979, August 1, 1979 and September 5, 1979. Those motions are still pending before the District Court.

control over the educational system have been vested in state and local authorities", *id.* at 20 (101a), and that this is especially true when such decisions involve the allocation of "scarce educational resources", *id.* at 21 (102a), the Court of Appeals held that "the Act contemplates that the determination of appropriate educational goals, as well as the method of best achieving those goals, are matters which are to be established in the first instance by the states". *Id.* at 22 (103a-104a).

The Court of Appeals did, however, go on to consider whether the Act restricts the states in making those determinations. It determined it did in two respects. First, the Act provides for federal oversight by the Commissioner of Education. Second, the Act requires individual attention to the needs of each handicapped child. The Court of Appeals went on to hold that the 180-day rule violated these restrictions insofar as it is an inflexible standard which avoided the procedures for consideration of individual needs and, in addition, had not been "filtered" through the Commissioner of Education and the general public. *Id.* at 25-27 (107a-110a).

Because its reasoning differed from that of the District Court, the Court of Appeals recognized that some of its orders might require modification, but remanded the case to the District Court to undertake such modifications on motion of the parties (110a, 120a).[6] It is from this decision that defendant Scanlon, hereinafter referred to as petitioner, seeks a writ of certiorari.

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[6] Subsequently, on August 22, 1980, the Court of Appeals denied defendant Scanlon's petition for rehearing (130a). On October 27, 1980, the District Court denied defendant Scanlon's motion to vacate its order (139a).

V. REASONS FOR GRANTING THE WRIT

A. This Case Presents a Question of Great Public Importance

The Education For All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* (hereinafter the "Act") is a funding statute intended to assist the states in providing an education for handicapped children. The primary condition of eligibility for the Act's funding is the provision of a "free appropriate public education" to all school-aged handicapped children[7] within the recipient's jurisdiction. 20 U.S.C. §1412(1) (149a-150a). The nature of that education is only vaguely described. 20 U.S.C. §1401 (18) (141a). However, also required is the establishment of extensive procedures for determining the contours of the free appropriate public education to be delivered to each child on an individualized basis.[8]

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[7] "Handicapped children" is defined as mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, children with specific learning disabilities who by reason thereof require special education and related services. 20 U.S.C. §1401(1) (140a).

[8] These procedures include preparation of detailed individualized educational programs for each child, 20 U.S.C. §1401(19) (141-142a) and extensive due process, including both administrative and, if necessary, federal court hearings and appeals. 20 U.S.C. §1415 (158a-162a).

In 1979, Congress appropriated over $800 million for distribution under the Act,[9] an amount which constituted only about fourteen percent[10] of the total amount expended for the education of handicapped children by the forty-nine states[11] which received those funds.[12] Approximately four mllion children received services under the Act in 1979.[13]

Prior to the decision in this case,[14] Pennsylvania and many other states set limits on the number of days that educational programs would be funded for handicapped

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[9] Office of Education, Department of Health, Education and Welfare, *Progress Toward a Free Appropriate Public Education*, 112 (January 1979) (A report to Congress on the implementation of the Act) (hereinafter *"HEW Report"*). In 1976, Congress appropriated $315 million and in 1978, $465 million. *Id.*

[10] *Id.* at 113.

[11] New Mexico did not apply for funds.

[12] In enacting the Act, Congress estimated that in 1976 nearly fifty percent of the eight million handicapped children in the United States were not receiving a free appropriate public education. Pub. L. 94-142 §3(a). Congress also estimated that by 1982, when all eligible children would hopefully be receiving services, the annual federal cost of fully funding the statutory formula would be in excess of $3.1 billion. 121 Cong. Rec. 37026 (November 18, 1975). Anticipating, however, that funds would not be appropriated in the amounts necessary to fully fund the formula, Congress provided for pro rata reductions in the event that appropriations fail to match authorizations. 20 U.S.C. §1411 (142a-149a).

[13] *HEW Report, supra* at 113.

[14] At least four states are presently litigating the legality of their rules. *Georgia Association for Retarded Citizens v. McDaniel*, C78-1950 A (N.D. Ga., filed Nov. 13, 1978); *Matthews v. Campbell*, C.A. No. 78-0879-R (E.D. Va., filed Sept. 20, 1978); *Crawford v. Pittman*, No. 6080-16-LS-O (N.D. Miss., filed Jan.

children. In Pennsylvania, that number was 180 days, the same number of days provided to non-handicapped children.

While the Act is silent on the length of the school year, the court below found that Pennsylvania's refusal to provide more than 180 days of education to any handicapped child was inconsistent with the Act's emphasis on the individual.[15] *Battle v. Kline,* infra at 26 (108a). Thus, according to that court, a state must consider for each[16] handicapped child whether that child "requires" more than 180 days of education and, if so, how many.

Ironically, in so holding, the Court of Appeals purported to recognize that the requirements of the Act are limited by the availability of resources[17] and that the "hard decisions of resource allocation, like determinations of education policy, are best left to the states, in the first in-

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25, 1980); *Yaris v. Special School District of St. Louis County,* C.A. No. 80-4075 CVCW (W.D. Mo., filed May 9, 1980); *State Board of Education v. Riles,* No. CV 180-539cc, Div. No. 1 (C.C. Cole Co., Mo., filed June 19, 1980).

[15] The lower court also held that the rule was improper because it had not been approved by the Commissioner of Education. *Battle, infra* at 27 (109a).

[16] In his concurring opinion, Judge Van Dusen attempted to limit the effect of the ruling to a relatively small class of children. *Battle, infra* at 30 (112a-113a). The majority opinion of Judge Hunter provides no basis for such a limitation as it is based on the failure of the 180-day rule to "allow individual consideration of *each* handicapped child." *Battle, infra* at 26 (108a) (emphasis added).

[17] Although disagreeing in a number of areas, each member of the appellate panel agreed on this point. *Battle, infra* at 21 (Hunter, J.), 31-32 (Van Dusen, J., concurring) and 38 (Sloviter, J., concurring and dissenting) (102a-103a, 115a, 122a).

stance."[18] *Battle, infra* at 21 (103a). This deference was clearly superficial. Pennsylvania and other states appropriate a fixed sum annually for educational services to the handicapped. Rational and equitable administration requires that certain rules be established to guide that process. Certainly, no consideration is more basic to educational planning and resource allocation than the determination of how many days the schools will be open. In requiring individualized determinations of the length of the school year for each handicapped child, the lower court has effectively established a first come, first serve basis for resource allocation.

This novel holding will have the obvious effect of greatly increasing the already substantial cost of educating handicapped children.[19] As importantly, it will seriously

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[18] In denying defendant Scanlon's motion to vacate its orders, including its order of September 5, 1979 requiring that the Commonwealth provide more than 180 days where necessary to maximize self-sufficiency of certain handicapped children, the District Court apparently found that the Commonwealth had already set an educational goal of maximizing self-sufficiency. See 20 Pa. Code §13.2 (136a). However, as the Court of Appeals recognized, such a goal is not a standard within the meaning of the Act. *Battle, infra* at 23-24, n. 11 (105a-106a). See also *Pierce v. Board of Education of City of Chicago*, 69 Ill. 2d 89, 370 N.E. 2d 535 (S.Ct. Ill. 1977) ("pronouncement of laudable goal of 'the educational development of all persons to the limits of their capacities' is a statement of general philosophy, rather than a mandate that certain means be provided in any specific form"). Moreover, any such standard was obviously subject to already existing rules concerning the allocation of available resources, e.g. The "180-day rule". See 24 P.S. §13-1376 (maximum payments for private school placements).

[19] For example, the Court of Appeals left intact District Court orders requiring that three of the five named plaintiffs be main-

interfere with the ability of state and local authorities to make educational policy and allocate limited educational resources, a result this Court has decried in other cases. See *Millikin v. Bradley,* 418 U.S. 172, 741-42 (1974); *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973).

Moreover, there simply can be no dispute that the longer schools are open for one group of children, the less money will be available for all other groups. Because of the expense of educational programs for the handicapped,[20] those programs must clearly have an impact on the resources available for the education of non-handicapped children. Thus, the Court of Appeals has substantially impaired the ability of state and local governments to allocate their limited resources in such a way as to ensure the equitable provision of educational services to all children, handicapped and non-handicapped. See *Mills v. Board of Education,* 348 F. Supp. 866, 876 (D.D.C. 1972).

This result is not only inconsistent with the Act,[21] but also with principles long recognized by this Court. See *Millikin v. Bradley, supra; San Antonio School District v. Rodriguez, supra.* Accordingly, this Court should grant review in this case.

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tained in 365-day residential placements. The annual cost of one of those placements was over $15,000. (Plaintiff's Exhibit 73, para. 28).

[20] Even in 1975, before the enactment of the Act, the average cost of educating a handicapped child was estimated to be nearly twice that of educating a non-handicapped child. H. R. Rep. No. 332, 94th Cong., 1st Sess. 12 (1975).

[21] See pp. 16-20, *infra.*

B. The Court of Appeals Erroneously Held That the Education for All Handicapped Children Act Prohibits a State From Limiting the Length of Its School Year in a Manner Equally Applicable to Both Handicapped and Non-Handicapped Children

In essence, the Court of Appeals interpreted the Education For All Handicapped Children Act to be open-ended in its promise to handicapped children. While the Act is certainly significant, both its terms and its history indicate more limited aims.

Properly read, the Act assures equal educational opportunity for handicapped children in two important respects. First, having found, in 1976, that many handicapped children had no access to free public education of any kind, Pub. L. 94-142, §3(a), Congress mandated such access be provided for all those of an age at which free public education is provided to non-handicapped children. 20 U.S.C. §1412(2)(B) (149a-150a). At the same time, finding that many other handicapped children were unable to benefit from programs to which they did have access, Pub. L. 94-142, §3(a), Congress imposed various conditions intended to ensure that while in the classroom handicapped children received programs from which they could benefit. See 20 U.S.C. §1401(17) (141a).

These goals and the manner in which Congress sought to achieve them are entirely consistent with the standards of equal protection which Congress sought to apply.[22]

[22] In enacting the Act, Congress clearly assumed that the courts had already established an equal protection "right to education" for handicapped children and sought to "take a more active role under its responsibility for equal protection of the

Under those standards, it is clearly improper to exclude any child entirely from the educational process. *Mills v. Board of Education, supra.* See *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973) (hereinafter *"Rodriguez"*). It may also be improper to provide only a program from which a child can derive no benefit. See *Fialkowski v. Shapp,* 405 F. Supp. 946 (E.D. Pa. 1975).

In no way does Pennsylvania's refusal to fund more than 180 days of education deny equal access to the classroom. To the contrary, it applies equally to both handicapped and non-handicapped children. Nor does it deny adequate programs as it has no effect on the nature or quality of the services provided in the classroom. Significantly, there has been no finding in this case that any child cannot benefit from 180 days of education.

On the other hand, Congress also recognized, as had this Court in *Rodriguez, supra,* that "local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Rodriguez, supra* at 49-50. Thus, the Act allows for a large degree of local control, defining a "free appropriate public education" as "special education" and "related services" which, *inter alia,* "meets the standards of the state educational agency." 20 U.S.C. §1401-(18).

The Court of Appeals purported to recognize the Act's general deference to state and local authorities, finding

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laws. . . ." S. Rep. No. 168, 94th Cong., 1st Sess. 9 (hereinafter "S. Rep. 94-168"), *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1433.

> that the Act contemplates that the determination of appropriate educational goals, as well as the method of best achieving those goals, are matters which are to be established in the first instance by the states.

Battle, infra at 22 (103a-104a). It also purported to acknowledge the primary role of the states in allocating their "scarce educational resources". *Battle, infra* at 21 (101a-102a). It failed, however, to recognize that a rule limiting the length of the school year is a "standard of the state educational agency" within the meaning of the Act—a standard directly related to the determination of educational policy and, as importantly, the allocation of the limited resources of the Commonwealth of Pennsylvania.

In this regard, the Act is unusually detailed when it intends to abrogate the exercise of local control. For example, it specifically describes the children who are to receive services under the Act, 20 U.S.C. §§1401(1) (definition of "handicapped children"); 1412(2)(B) (the age groups to be served). The Act is also detailed in describing those services which must be provided when required to assist those children to benefit from their educational programs. 20 U.S.C. §1401(17) (definition related services) (141a). The Act is, however, entirely silent on the length of the school year. In light of the significance of that matter, it must be presumed that it is left to the discretion of the states. Cf. *Southeastern Community College v. Davis,* 442 U.S. 397 (1979).

That presumption is not overcome by the Act's "emphasis on the individual." *Battle, infra* at 26 (108a). Rather, the provisions which provide that emphasis are intended to ensure only the provision of equal education

opportunity: access to an appropriate classroom[23] and provision of meaningful programs while in that classroom.[24] Neither goal justifies, let alone, requires, the abrogation of local control over the length of the school year.

That Congress recognized both the nature of the burden it was imposing on the states and the necessary limits of that burden is clear from the Senate Report which quotes, with approval, the following language from the opinion in *Mills v. Board of Education,* 348 F. Supp. 866, 876 (D.D.C. 1972):

> The defendants are required by the Constitution of the United States, the District of Columbia Code and their own regulations to provide a publicly-supported education for these 'exceptional' children. Their failure to fulfill this clear duty to include and

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[23] One component of the mandated "Free appropriate public education" is "special education". 20 U.S.C. §1401(18 (141a). Special education is defined as:

> 'special instruction . . . to meet the unique needs of the handicapped child', including classroom instruction, instruction in phyical education, home instruction, and instruction in hospitals and institutions.

20 U.S.C. §1401(16) (140a-141a). This requirement merely recognizes that some children might be unable to attend a traditional classroom because of their handicaps and ensures that no child will be excluded from instructional services by reason of such disability.

[24] Having ensured that no child would be physically excluded from educational services, Congress then ensured those services would be meaningful by requiring, as the second component on a "free appropriate public education" the provision of those non-instructional " 'related services' . . . required to assist a handicapped child to benefit from special education. . . ." 20 U.S.C. §1401(17) (141a).

> retain these children in the public school system or otherwise provide them with publicly-supported education and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds . . . the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. *If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expanded equitably in such a manner that no child is entirely excluded from a public-supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the exceptional or handicapped child than on the normal child.*

S. REP. No. 94-168, p. 23, *reprinted in* 1975 U.S. Code Cong. & Ad. News, p. 1447. Certainly, consistent with this statement, limited funding cannot be permitted to bear more heavily on the non-handicapped children of Pennsylvania.

A rule which provides equal access to the classroom—180 days—for both handicapped and non-handicapped children, ensures that neither will suffer at the expense of the other and is, therefore, consistent with both the spirit and letter of the Act. Accordingly, this Court should grant review in this case and reverse the decision of the lower court.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

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APPENDIX

1. DECISION OF JUDGE NEWCOMER
(Filed June 21, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-172

PATRICIA ARMSTRONG, et al.

v.

CARYL KLINE, et al.

Civil Action No. 78-132

PATRICIA SUE BATTLE, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

Civil Action No. 78-133

NATALIE BERNARD, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Newcomer, J., June 21, 1979.

I. INTRODUCTION

In January 1978, five handicapped children and their parents commenced three class action lawsuits. Plaintiffs allege that defendants violated and continue to violate plaintiff children's constitutional and statutory rights by denying them a free publicly funded education in excess of 180 days, the provision of which they seek to compel in these suits. Since the actions began, one plaintiff, Patricia Battle, has turned twenty-one and, therefore, no longer seeks nor is eligible for future educational placement; however, she, as well as plaintiff Natalie Bernard, seeks damages for defendants' alleged deprivation of her rights.

The trial of this matter demonstrates the important and difficult role the judiciary must play in the expanding field of educational law. In the 1970's, through judicial action[1] and federal legislation,[2] the rights of handicapped children have been enlarged and guaranteed and they and

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[1] *See, e.g.*, Frederick L. v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976) *aff'd*, 557 F.2d 373 (1977); Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975); Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).

[2] *See, e.g.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794; Education for All Handicapped Children Act, 20 U.S.C. §1401, et. seq.

their parents have been given the power to enforce those rights in several forums, including federal court.[3] But when they come to court, as they do here, they ask it to rule on issues of law and to resolve factual debates between educators in a field with which the courts, to this point, have had little familiarity. Thus, besides determining questions of statutory interpretation of first impression, the Court here is called on to decide what effect interruptions in programming have on handicapped children, an issue on which educators disagree. Rendering these determinations are difficult, but they are crucial if the rights of handicapped children are to be protected.

For purposes of trial on their common injunctive and declaratory issues, the three lawsuits were consolidated, and trial on those issues was held in March 1979.

II. FACTUAL FINDINGS

A. *Parties*

The named plaintiff children are: John Garrett (Gary) Armstrong, Richard H., Mark Anderson, Patricia Sue Battle and Natalie Bernard. The children's parents are also named as plaintiffs.

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[3] Recent commentary discussing the developing role of the federal courts in the area of the education of the handicapped include: Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103 (1979); Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 Temp. L.Q. 961 (1977); Note, *The Education of All Handicapped Children Act of 1975*, 10 U. Mich. J.L. Ref. 110 (1976).

Plaintiff Gary Armstrong is eight years old and is classified for educational purposes as severely and profoundly impaired. He resides with his parents, plaintiffs John and Patricia Armstrong, in the Philadelphia School District. Presently, Gary attends a public Philadelphia School District facility as a day student, in a class for the severely and profoundly impaired.

At eighteen years old, plaintiff Richard H.'s primary handicap is a severe emotional disturbance. Attending Elwyn Institute, Richard is in a five-day a week, 180 day residential program. He and his mother, plaintiff Norma H., are residents of the Philadelphia School District.

Plaintiff Mark Anderson also is handicapped by a severe emotional disturbance. Mark, who is nineteen, is a twelve month residential student at the Devereux Foundation. Plaintiff Eloise Anderson, Mark's mother, resides in the Philadelphia School District.

When suit was instituted, plaintiff Patricia Sue Battle was twenty years old, attending as a residential student, The Woods Schools. She is severely emotionally disturbed and brain injured, and her parents, June and Donald Battle, reside in the Abington School District.

Plaintiff Natalie Bernard is seventeen years old. Severely mentally retarded, as well as orthopedically handicapped, she is a residential student at Elwyn Institute. With her parents, plaintiffs Clara and Robert A. Bernard, she resides within the Marple Newtown School District.

By Order dated February 21, 1979, the action captioned *Armstrong v. Kline,* Civil Action No. 78-172, was certified as a class action pursuant to Rules 23 (a) and 23-(b) (2) of the Federal Rules of Civil Procedure on behalf of a class composed of:

> "All handicapped school aged persons in the Commonwealth of Pennsylvania who require or who may require a program of special education and related services in excess of 180 days per year and the parents or guardians of such persons."

As the other two related cases were consolidated with the *Armstrong* action, no additional certifications were required and the consolidated actions are now proceeding on behalf of the above-described class.

In all three actions, plaintiffs instituted suit against the then Secretary of Education, Caryl M. Kline, in her official capacity. In addition, Gary Armstrong, Richard H., Mark Anderson and their parents sued the School District of Philadelphia, the Superintendent of the School District, Michael Marcase, and members of the Philadelphia Board of Education. Besides the Secretary of Education, Patricia Sue Battle brought her action against the Abington School District, Dr. Carl B. Hoffman who is the Superintendent of the Abington School District, The Woods Schools and Dr. Harold S. Barbour, President of The Woods Schools. Similarly, Natalie Bernard also named the following individuals and entities as defendants: the Marple Newtown School District; Glenn M. Sanner, Superintendent of the Marple Newtown School District; Elwyn Institute; and, Dr. Gerald R. Clark, President of Elwyn Institute.

Defendant school districts and the Department of Education (DOE), of which defendant Kline was the chief official, are recipients of federal financial assistance, including, but not limited to, funds received under the Education for All Handicapped Children's Act. As the state educational agency, the DOE is responsible for in-

suring that free and appropriate special educational services are provided to all handicapped school-aged persons in Pennsylvania. Defendant Philadelphia, Abington and Marple Newtown School Districts are local educational agencies, and defendant The Woods Schools and Elwyn Institute are approved private schools that may provide services to handicapped children and be eligible for reimbursement from public funds for the provision of those services.

B. *Defendants' Procedures, Practices and Policies*

The Department of Education, which has paramount responsibility within the Commonwealth for the design and financing of publicly funded education for handicapped and non-handicapped children, requires local school districts and their agencies to develop annually an individualized education program (IEP) for each handicapped child. The IEP maps out the child's educational program and placement, detailing the degree to which the child will be in special and regular settings, his or her current functioning level, short-and long-term educational goals, and the methods by which they are to be achieved. Before the IEP is formulated, the child is evaluated by educational and medical personnel appropriate to that child's handicap. A multidisciplinary team composed of persons familiar with the child then reviews these evaluations and all other relevant data and determines the type of educational program that it believes appropriate in light of the nature and severity of the child's handicapping condition. The child's parents or guardians review the IEP with the educators and are permitted to comment on it.

If parents disagree with the school district or the DOE about any aspect of their child's educational pro-

gram, placement or classification, a "due process procedure" may be initiated by any of the parties. A hearing examiner, who is not employed by the school or intermediate unit in which the case originates, will be appointed by the DOE and he or she will conduct a hearing.

It is the policy and practice of DOE to refuse to provide or to fund the provision of education for any child, handicapped or non-handicapped, for a period in excess of 180 calendar days per year. It has instructed hearing officers conducting due process hearings that they are without authority to, and may not, order a special education program which is in excess of 180 days per year. Similarly, defendants Philadelphia, Abington and Marple Newtown School Districts will not provide or fund the provision of education for any of the children within their respective districts for a period in excess of 180 days.

C. *Plaintiff's Attempt to Challenge the 180 Day Rule Prior to Instituting Suit*

In February, 1977, the Philadelphia School District placed plaintiff Gary Armstrong in the Torresdale School, which operates its educational program for approximately nine and one-half months per year. Following his placement at Torresdale, Gary's parents requested a special education due process hearing concerning both his program and placement. At the hearing held in March 1977, the issue of Gary's need for a continuous educational program in excess of 180 days was raised. Although she did not explicitly order the Philadelphia School District to provide Gary with a program of summer education, the hearing examiner decided that "as much programming as possible should be done to prevent regression." (P-5 at p. 25). "Expert opinion supported by professionals and parents . . .

that a 12 month program for Gary was important to prevent regression during the summer months especially since degenerative processes are a characteristic of his syndrome," provided the basis for her decision. (*Id.* at p. 28) Believing that the hearing examiner had awarded Gary summer programming, his parents met with the Assistant Director of Special Education of the Philadelphia School District in May 1977. Nevertheless, he informed them that the School District would not fund a program of summer education for Gary, regardless of his needs, as it was not empowered to do so by the DOE. The meeting's participants drafted a letter to the Special Education Assistant for the DOE asking for confirmation of its position; in her reply, the Special Education Assistant confirmed what the School District believed, which was that a program of public or publicly funded special education was not available for the summer.

Although the mothers of Richard H. and Mark Anderson protested the DOE's and the Philadelphia School District's failure to provide their children with year-round programming, neither requested a due process hearing on the issue; nevertheless, their counsel was informed that regardless of the circumstances, neither the DOE nor the School District would provide or fund an educational program for the boys in excess of 180 days.

The parents of Natalie Bernard and Patricia Battle did not challenge defendants' application of the 180 day rule to their children's educational program.

If plaintiffs had tried to challenge defendants' 180 day rule through the Commonwealth's due process procedures, their efforts would have been futile because of defendants' instructions to hearing examiners that such a

program would not be available and that the hearing examiners were without authority to order it.

Turning to the federal authorities, counsel for Armstrong, H., and Anderson plaintiffs wrote to the federal Office for Civil Rights of the Department of Health, Education and Welfare requesting an interpretive ruling on whether federal statutory law, i.e., the Education for All Handicapped Children Act and/or Section 504 of the Rehabilitation Act, can ever require defendants to provide a program of continuous education to a handicapped child. Prior to trial, the agency did not respond.

On January 25, 1979, counsel for the Armstrong, H. and Anderson plaintiffs contacted the federal Bureau of Education for the Handicapped and requested a similar ruling from that agency. Again, no response was received before trial.

D. *Characteristics of the Class and of Named Plaintiffs Relevant To Their Educational Needs*

The children that plaintiffs allege are members of the class, as defined above, suffer from various handicapping conditions, but generally can be classified in two separate, occasionally overlapping, categories: severely and profoundly impaired by mental retardation with other handicaps; and severely emotionally disturbed.

1. *The Severely and Profoundly Impaired by Mental Retardation*

Although it is often difficult to categorize the degree of mental retardation from which an individual suffers, there are certain recognized labels for levels of mental retardation, which professionals employ to help discuss

both the characteristics of an individual's handicap and his or her needs. These levels are:

(a) Mildly retarded. The mildly retarded have an I.Q. range from 50 to 75. At the completion of their formal education, it is likely that these individuals will be able to read at the second or third grade level, do simple mathematics, and function in society. They do not look different from non-handicapped persons and often are unidentifiable once formal education has been terminated. They are likely to assume unskilled or semi-skilled positions in the workforce.

(b) Moderately retarded. With an I.Q. range from 30 to 50 and frequently suffering from physical impairments, the moderately retarded are more likely than the mildly retarded to look "different." Moderately retarded children can be expected to learn simple arithmetic, have a sight vocabulary and perform simple reading skills.

(c) Severely retarded. The severely retarded have an I.Q. below 30, are likely to be physically handicapped and have difficulty moving. They may enter the school system without toilet training and lack many basic self-help skills, such as dressing and feeding. Their language deficit is usually significant. Academically, one expects their achievements to be very limited, although they may be able to count, tell time and identify a few words on sight at the completion of their education.

(d) The profoundly retarded. Being the lowest functioning group, the profoundly retarded are unlikely to be ambulatory or have any vocabulary. A

profoundly retarded child's means of communication are minimal, perhaps limited to pointing or gesturing.

As the severity of retardation increases, so does the likelihood that the child will have multiple handicaps; in fact, very few children who are severely or profoundly retarded do not have other impairments. For this reason, children who are severely or profoundly retarded are often referred to as "severely and profoundly impaired" (SPI).

SPI children usually learn at a much slower rate than non handicapped children and have difficulty remembering what they learn. The lower functioning the child is, the quicker he or she will forget information and lose skills that are not practiced. Generalizing the skills that are learned also presents problems for SPI children; they often do not recognize that they should use learned skills in an environment different than the one in which they were originally taught.

Natalie Bernard is an SPI child, suffering from Down's Syndrome. Although she has made some progress in reading and music, she is severely retarded in terms of her intellectual and social abilities. Obstinate in her ways, she requires constant supervision. Complicating her handicap, Natalie has developed double scoliosis, that is two sideway curvatures of the spine; because of this condition, she must wear a brace twenty-three hours a day.

Gary Armstrong is also labeled as an SPI child but, unlike many other SPI children, he was not mentally retarded at birth. He exhibited all the signs of a normal child until he was nearly two years old. After that, his rate of learning decreased, he became hyperactive and his parents could not toilet train him. Recognizing that Gary had a problem, his parents took him to doctors who

diagnosed his condition as San Filippo, Type A Syndrome, a genetic disease. Persons suffering from San Filippo disease lack an enzyme essential to the metabolization of mucopolysaccharides. Without the enzyme to break them down, the mucopolysaccharides accumulate in the connective tissue of the body and cause progressive physical and mental deterioration. The symptoms of the disease, which begin to appear between one and one-half and three years of age, include coarsening of the features, progressive mental retardation, joint contractures, hyperactivity and seizures. Almost all San Filippo children begin to act in a violent and aggressive manner as the disease progresses. Their mobility decreases and they are confined to a wheelchair during the latter part of life. Persons with the disease have a life expectancy of less than twenty years. Because of their immobility and progressively worsening physical, emotional and mental states, which do not allow their parents to control them, they are usually institutionalized during the last stage of the illness. Death generally results from a secondary infection, such as pneumonia, which is easier to contract when institutionalized and immobile. The disease knows of no cure.

San Filippo Syndrome severely affects intellectual development so that by the time they reach school age, children with this disease are in the severe to profound range of mental retardation, with limited receptive and expressive language skills. As the mucopolysaccharides build up and the disease progresses, the San Filippo child becomes more retarded, losing previously acquired skills.

Gary Armstrong is presently severely to profoundly mentally retarded, hyperactive, physically disabled by progressive joint contractures, somewhat deaf and frequently the victim of psychomotor seizures.

2. *The Severely Emotionally Disturbed*

As with SPI children, it is often difficult to distinguish and identify the specific handicap from which a severely emotionally disturbed (SED) child suffers. Classifications utilized by professionals in the field frequently blend one with another. But, to aid in understanding the types of disabilities which these children endure and the characteristics of these disabilities, it is useful to employ the follownng categories in analyzing the problems of that class of children generally characterized as severely emotionally disturbed:

(a) Autistic children. An autistic child functions without emotional contact with other human beings and does not communicate with speech. Such a child insists on maintaining the sameness of his or her environment and is upset by changes. Demonstrating a number of bizarre behaviors and movements, the child may spin or rock. These behaviors commence within the first year and one-half of life, and the child will show evidences of higher level intelligence than these behaviors otherwise indicate.

(b) Symbiotic children. Symbiotic children become extremely attached to and cannot be separated from one person. Like autistic children, they demand sameness in their environment and exhibit a high degree of anxiety and bizarre behavior if routines are interrupted.

(c) Schizophrenic children. These children may enter relationships with others and communicate orally, but the nature of their communications and relationships are strange and bizarre, exhibiting their inability to cope with reality and articulate it in their

communications. For example, a schizophrenic child may be bleeding but, rather than cry or call for help, he or she will laugh. These children express extreme anxiety at the slightest change in routine, or in the presence of pressure or frustration. Tantrums are common to their behavior.

There are other types of children who function at a higher level than those described above, but who are still considered seriously emotionally disturbed. They would include post-symbiotic, post-autistic and higher functioning schizophrenic children whose disturbances seriously interfere with learning and their ability to function.

SED children are unable to tolerate frustration and other pressures such as those imposed by focusing attention and waiting. Because of this and their inability to exercise self-control, they experience extreme difficulty learning. Once having learned a skill, like SPI children, they have problems generalizing that skill.

Richard H. originally was considered an autistic child when, at eighteen months, he stopped talking and shut himself off from the world. Now eighteen, he is currently diagnosed as a childhood schizophrenic, chronic type, manifesting severe ego disturbance, infantile regressive behavior with pervasive anxiety and signs of minimal brain dysfunction. Although able to better control himself today than just a few years ago, Richard is still anxiety ridden and may engage in compulsive and ritualistic activities. He remains hyperactive and has occasional temper tantrums; he also has a foot and cleanliness fetish.

Mark Anderson is another SED child. He had a nervous breakdown at thirteen and suffers today from severe emotional disturbance, characterized by temper

tantrums, enuresis, self abuse, hyperactivity, ritualistic behaviors and verbal and motor stuttering. Under the stress of pressure or demands, Mark may become more aggressive and exhibit additional ritualistic behaviors. His attention span is short and he can be distracted easily.

Patricia Sue Battle's parents first suspected her handicap when at eighteen months she did not respond to noise. After the doctors recognized that she did not have a hearing problem, they diagnosed her problems as stemming from an emotional disturbance which eventually was labeled as autism. Her emotional problems are compounded by mild to moderate retardation.

E. *The Educational Process with Respect to SPI and SED Children*

1. *The Educators' Goals for SPI and SED Children*

As do educators of normal children, teachers of the SPI and SED often articulate the goal of education as being the attainment of the child's highest potential. But, of course, when they discuss the potential of these types of handicapped children as compared to non-handicapped children, it is clear that there are differences both in expectation and reality. While an educator may anticipate that a normal child will become a doctor, professor, musician or magician, these are not the sights set for the SPI or SED child. Generally, educators of the SPI or SED speak of their students' potential in terms of attaining the highest level of self-sufficiency that the child can achieve, whether that be acquiring additional self-help skills, avoiding institutionalization or attaining that level of independence with regard to self care that he or she can live in a community living arrangement or at home and

work in a sheltered workshop. Both plaintiffs' and defendants' experts agreed that these generally were the objectives of the education of the SPI and SED. With the exception of Gary Armstrong, these are also the types of goals that the teachers of the named plaintiffs have set for them and believe them capable of achieving with proper educational programming.

Of course, some SED or SPI children will surpass these levels of achievement. Others will not reach them and for them, the goals may be more modest, but equally important to reach. For instance, a child suffering from San Filippo Syndrome, such as Gary Armstrong, will probably not live long enough or be able to become sufficiently independent to reside in a community living arrangement or work in a sheltered environment. For this type of child the educator's goal is to provide skills that keep the child mobile and at home for as long as possible, for these two factors contribute to increasing life expectancy. Out of the institution and out of bed, the child's chances for contracting such secondary diseases as pneumonia are reduced.

2. *The Educational Program*

Given the disparity in goals, it is not surprising that the educational program for SPI and SED children is very different from that of normal students. Although mathematics and reading may, in some instances, be part of these children's curriculum, they are not the staples of it.

It is not unusual for the SPI child to enter the school system without such basic skills as toilet training, self-dressing, and self-feeding. If this is the case, that is where the educator begins; the educational program will be designed to teach these skills. As the child progresses

and masters these fundamentals, the educational program will be supplemented, providing for the teaching of more complicated tasks, such as counting, making change and identification of simple words.

Natalie Bernard's program at Elwyn Institute, for instance, is one of functional academics, focused on developing basic language, arithmetic and living skills, including those of hygiene, dressing, and pre-workshop. They are taught for the purpose of enabling her to live and work outside the institutional setting and in a group home and sheltered workshop.

Because of Gary Armstrong's limited abilities which constantly degenerate and the goal of keeping him mobile and out of the institution, the skills that he is taught at the Torresdale School are even more basic than those that Natalie Bernard learns. One of the major areas of concern with regard to his programming is teaching him skills that allow him to be managed and controlled by his parents, because once he becomes uncontrollable, institutionalization is almost unavoidable. Although aggression and violent behaviors characterize San Filippo syndrome, experts believe that there is a direct correlation between reduced levels of these unacceptable behaviors and participation in educational programs teaching self-control skills. Consequently, Gary is taught such skills as sitting down upon being told to do so, keeping his hands down, dressing, coming when called, feeding and toilet training. Because Gary is losing his hearing, his teacher also is teaching him some sign language to enable him to communicate and be communicated with when he becomes completely deaf.

SED children, like SPI children, may lack basic life skills. But frequently, before the educator can begin to

teach these skills, the child must be helped to cope with the emotional disturbance that is the source of the problem. Therefore, it is not uncommon for the SED child's curriculum to include psychotherapy or other programs designed to develop relationships with others, decrease inappropriate behaviors and increase appropriate behaviors.

At Elwyn Institute, Richard H.'s educational program is constructed to provide him with functional skills, as well as to aid him in his social development, which the experts recognize as a prerequisite to his learning. Similarly, Mark Anderson's educational program integrates programs designed to furnish him with functional skills and those that will enable him to deal with his emotional problems. He is given individual psychotherapy at Devereux. When she was attending The Woods Schools, Patricia Battle was also given psychotherapy as well as an educational program stressing development of life skills.

3. *Teaching Methods*

Although the specific method for teaching SPI children may vary from teacher to teacher and from child to child, SPI teachers usually employ the "diagnostic-prescriptive" model as a basic teaching guide. The model, which is endorsed in the DOE's curriculum guide for retarded children, first instructs the teacher to determine the child's level of functioning and needs. Based upon that assessment, appropriate long-and short-term goals should be set, as well as criteria for determining when the goals are attained. The educator may teach the child the goal in small discreet steps that build one on another and must be achieved to reach the goal. The small steps are taught by way of practice sessions or "trials" until they are learned. To evaluate the child's progress in learn-

ing the small steps and reaching the goal, the teacher may employ the data-based teaching method, which requires that the child's responses to each trial be recorded and then reviewed. If the child fails to progress as anticipated, the plan is modified. When a child achieves the criteria for learning a goal, he or she should continue to practice it so that the child will learn to generalize it and perform it naturally in a variety of environments and for a variety of people. The more related the goals and small steps are to the child's routine outside the classroom, the easier it will be for the child to generalize what has been taught. When the behavior has been generalized, it is considered mastered.

The diagnostic prescriptive model also is useful to teach SED children functional skills and to modify their behaviors. In addition, SED teachers employ psychotherapy and other psychological techniques aimed at establishing inter-personal communication. These techniques may include exercises aimed at relaxing the child and securing his or her trust in others. To reach these ends, psychologist or other educational personnel may allow the child to dance, take walks, roll down hills or otherwise vent frustration.

4. *Factors Affecting Learning*

To understand the handicapped child's educational process, it is necessary to recognize those factors in the educational environment that affect the child's learning ability. From the expert testimony, the Court concludes that several factors have an impact on whether and at what rate a child learns. Surely one of the most important and an immutable one is the nature and characteristics of the child's handicap. In many ways, this factor defines

the boundaries for learning. But other factors operate to affect the handicapped child's educational experience and can have a significant impact on it. Teacher competency is certainly one of them. So, too, is the functionality of the skill being taught; if the skill is one that can be performed outside the classroom, the chances that it will be learned and learned at a quicker rate than otherwise possible increase. Along these lines, the opportunity to practice outside the formal classroom is a significant factor. And finally, to some unknown extent, the length of time that a child has to practice a skill increases the likelihood that the skill will be mastered. If the child only has a short time to learn the skill, it might not be learned, but if the length of time to learn the skill is increased, so are the chances of learning, although it is by no means certain that the skill ever will be mastered.

F. *The Effects of Breaks in Programming*

The 180 day rule deprives the handicapped child of educational programming for more time than he or she receives it. Plaintiffs' contend that certain handicapped children, including named plaintiffs, are denied an appropriate education because of these breaks in programming. They claim that, during the breaks, these children regress to such an extent that the time required to regain lost skills and development once programming resumes is so great that it renders impossible progress and the learning required for reaching their otherwise obtainable goals in the area of self-sufficiency. Defendants deny that regression is an effect of programming interruptions and contend that any skill loss occurring during a break can be quickly recouped, without major impact on the child's progress.

1. *Regression*

The expert witnesses agree that it is the general opinion of educators and other professionals who work with SPI and SED children that substantial interruptions in educational programming cause some of these children to suffer a significant loss of skills because of the breaks. Nonetheless, the experts recognize that there is no known statistical study supporting or contradicting this opinion. They also acknowledge that non-handicapped children may experience a loss of skills during breaks of similar duration. The difference in opinion between plaintiffs' and defendants' experts lies in plaintiffs' experts subscription to the general opinion regarding handicapped children and the defendants' experts rejection of it.

a. *SPI Children*

From the experts' testimony concerning the class and named plaintiffs, the Court concludes that as a result of programming interruptions some SPI children lose a large amount of skills and development, even when their parents make reasonable efforts to help them maintain the progress made in school. Furthermore, the evidence is clear that this regression is caused, at least in part, by the absence of programming during the break.

The unanimous opinion of plaintiffs' experts was that some, but not all, SPI children lose a significant amount of previously acquired skills when their programs are interrupted. Associate Professor and Chairperson of the Department of Special Education at Temple University with a Ph. D. in Special Education, Dr. Terrence J. Piper has taught the mentally retarded and their teachers as well as having developed curriculum guides for them. Having witnessed and evaluated SPI children in less than twelve

month programs, he testified that a large number of them experience significant regression during breaks in programming. So too did Dr. John R. Kleiser, Director of Clinical Services at defendant The Woods Schools, and Dr. Marvin Rosen, the Assistant to the President of defendant Elwyn Institute, both of whom hold doctorate degrees in psychology from the University of Pennsylvania and have had experiences with SPI children. Christine Sadjian-Peacock, a teacher of SPI children, also testified regarding children with whom she had worked and who had lost many of their previously acquired skills during summer breaks.

The opinion of plaintiffs' experts is supported by the case history of the two named SPI plaintiffs, Gary Armstrong and Natalie Bernard, who regress when there are breaks in their programming. In the summer of 1977, Gary was not provided with an educational program. Prior to that summer, he had shown progress in most of his educational program areas, including eye contact, feeding, dressing and undressing, labelling, gross motor coordination, obeying simple commands, and verbalization. But, when he returned to school in the fall of 1977, and had the same teacher, he demonstrated a significant skill loss in most areas, including those enumerated above, even though he did show gains in a few other areas. Similarly, when Natalie Bernard comes home for weekends, she experiences regression in emotional development and functional skill level. Because she is a year round residential student at Elwyn Institute, there has been no opportunity to measure the severity of her regression over a long break. Nonetheless, Dr. John Gordon, Director of the University of Pennsylvania Neuropsychology Laboratory who has had significant experience assessing SPI disabilities opined that Natalie would experience severe regression if denied

summer programming. The Court finds no reason to doubt the accuracy of his studied prediction as he has examined Natalie, spoken with her parents and has had extensive experience with children of her disability.

The evidence compels the conclusion that certain SPI children lose a significant amount of their skills during significant breaks in their programming. Although defendants do not concede this point and their expert witnesses in the SPI area claim not to have witnessed significant regression with the SPI children they have taught and observed, they do not seriously refute the proposition that SPI children regress to some extent during breaks in programming. They strongly contend, though, that any regression that is experienced is not caused by the break itself and is merely coincidental with it. They lay the blame for loss of skills on the non-functionality of skills being taught, the lack of teacher competence and the parental failure to properly practice with the children skills that have been taught in school; they contend that the absence of a program is of no significance.

The Court cannot accept their theory. First, the correlation between breaks in educational programming and regression is significant and not merely coincidental. The evidence indicates that when SPI children, who plaintiffs' experts find regress during breaks, receive programming, they generally do not lose skills, even if they are taught what defendants' experts consider non-functional skills by what these experts deem not competent teachers and are not provided with a maintenance program by their parents. Therefore, it would appear that the absence of programming serves at least as the catalyst for regression during programming interruptions. Moreover, there are sound reasons for rejecting defendants' theory that these

other factors cause the regression that plaintiffs' experts report, and not the lack of programming.

As to functionality of skills, the evidence does not demonstrate that the SPI children, who plaintiffs' experts found lost skills during breaks in programming, were not receiving an education of functional skills. Although defendant's expert in the SPI area did not believe that a few of the programs that the named plaintiffs were receiving were functional, neither that expert nor any of defendants' witnesses generally assailed the skills being taught to those SPI children that plaintiffs' experts found to experience regression. In fact, since often these students were receiving the educational program required and approved by the DOE, one would expect that it would meet the standards of functionality set by defendants' experts.

Turning to teacher competency, the next alleged cause for regression during breaks in programming, again the record is barren of evidence indicating that the children who regress are being taught by incompetent teachers. Here too, one would expect this not to be the case as they are being supplied by defendants.

The final alleged cause for regression is the failure of handicapped children's parents to maintain their children's programming. Plaintiffs' experts, as well as defendants' experts, testified extensively in this area and the Court concludes that usually parents fail to help their SPI children maintain skills over breaks in educational programming. But this failure in many cases is unavoidable even when the parents wish to aid their children and make reasonable efforts to do so. Their inability stems from not possessing the expertise needed to help their children maintain their level of skills and not having sufficient time

during the day, given their other familial duties, to practice these skills with their children. Defendants' expert, Ellen Somerton Fair, who has a Masters Degree in Special Education and is Director of the Pennsylvania Training Model (an inservice training program for personnel working with SPI), did testify of her experiences with parents who have not seriously interrupted their home life and have been able to work with their SPI children and maintain their level of functional skills. Although her recollection may be accurate, the Court cannot accept her experiences as universal and generalize that all parents of SPI children will be able to, both in terms of skills and reasonable expenditures of time, maintain their children's level of skills. This would not be consistent with the experiences of plaintiffs' experts nor the conclusions drawn from them, which is that because parents lack educational training with respect to their children's handicap and face time constraints, there are some parents of SPI children who cannot maintain their children's skill level over breaks. Nor would it be in accord with the experiences of named plaintiffs Gary Armstrong and Natalie Bernard.

During the summer of 1977, when Gary was at home without an educational program, the Armstrongs were not able to help him maintain most of his previously acquired skills, even though they tried to do so, and are considered by his teacher and appear to the Court to be competent and concerned parents. Mr. Armstrong is a policeman, and his occupation, as well as his lack of training, render him incapable of working with Gary in a sufficiently able manner and for a sufficient amount of time to help Gary maintain his skills. Mrs. Armstrong has two other young children to watch, as well as Gary who needs constant supervision, and she did and still does attempt to carry

on his programs in the home. Her efforts have included frequent observations of Gary in school, keeping up dialogue between herself and Gary's teachers in a "log book", and utilizing classroom teaching techniques whenever possible. Still, she was not able to maintain Gary's skills during the summer that he was without programming.

The experts who have worked with and evaluated Natalie Bernard and her family situation do not think that her parents' efforts would allow her to avoid regression during breaks in programming. Natalie requires full time attention and supervision when she is at home. Although her mother is a psychologist, the experts testified that she and her husband would be unable to maintain Natalie's skills because of their personal involvement with Natalie and the other demands that she places upon them. Except for the general testimony concerning parents' abilities to maintain their SPI children's skills in the home environment, defendants' experts did not put forth evidence indicating that Natalie's parents could maintain her skills during long breaks in programming.

Although it may be possible for some parents, whose children would otherwise regress during breaks, to work with their SPI children and maintain their skill level, this certainly cannot be expected to be the result for all parents who make reasonable efforts to aid their children. Lacking the expertise of the SPI teacher and having first to provide the normal parenting services, there are some parents; who when they try to help their children, cannot stop the regression that otherwise occurs during a break in programming. Perhaps some of these parents could be taught both the skills necessary to help their children maintain what is learned and to manage their time at home

so that a sufficient amount could be devoted to the child's educational program. There was no evidence, however, that such a program was generally available to parents of SPI children.

In summary, the Court rejects defendants' theory that there are other causes of regression negating as a possibility the absence of programming as one of them. To say this, though, is not to dismiss those cases where these and other factors may contribute or even proximately cause regression. Lack of functionality of skills, teacher incompetency and parental failure to maintain their children's skills when they have both the time and ability to do so may in certain instances undoubtedly cause regression when the absence of a program, in and of itself, would not do so. But these, rather than the absence of education, have not explained why the children that plaintiffs' experts reported to have regressed during programming interruptions did so.

This regression experienced by SPI children, which is significantly greater than that known to normal children, is at least explained in part by the nature of the SPI child's disability and the manner in which it affects learning. As explained earlier, these children find it difficult to transfer skills to new environments and, therefore, often need to practice each step in a program to learn a skill and often practice it in different settings until it is mastered. And, because they have a problem remembering what they have learned, even a behavior which has been mastered must frequently be repeated or it will be lost. Breaks in programming, of course, means that the opportunity to practice skills with qualified teachers, which is crucial to both learning and retention, decreases and therefore, the chances that the child will regress increases.

Children suffering from degenerative diseases, such as Gary Armstrong's, will, because of the nature of their disease lose some of their skills regardless of their practice. But they may also lose skills as a result of a programming interruption. Many of the skills that Gary Armstrong lost during the Summer of 1977 he regained after returning to school. In the 1978 summer, when he received an educational program, he did not regress. Combined, this is strong evidence that it was not the progressive deterioration resulting from the disease that stimulated Gary's loss, but rather the absence of programming which caused the regression common to other SPI children.

b. *SED Children*

Resembling the SPI population, many SED children are reported to experience serious regression when their educational programs are interrupted. But unlike SPI children, SED students' regression is not normally confined to a breakdown in skill level; often, regression will occur in emotional development.

Professionals working with Richard H., Mark Anderson and Patricia Battle have all noticed and testified to in connection with interruptions in these children's education, a decrease in appropriate behaviors, as well as skill level, and an increase in inappropriate behaviors and emotional problems. There is no reason to doubt the accuracy of their testimony on these issues.

With the exception of one month at Evans School, Richard H. was without an educational program from June 1976 to January 1978. During that period his behavior deteriorated substantially. Based on this information, as well as other data about Richard's behavior and emotional problems, plaintiffs' experts predict that breaks

in programmings will cause Richard increased anxiety and recurrence of severe disruptive and inappropriate behaviors.

Mark Anderson experiences regression during a break and before it, if he is aware that it is going to occur. While at Devereux Mark has made progress in controlling some of his inappropriate behaviors, but when he comes home, even for two or three days, many of the inappropriate behaviors, such as stuttering and enuresis, which have been under control, often return. In addition, he returns to school a more tense and closed individual.

When Patricia Battle attended the Woods Schools as a residential student and went home over a break, she returned to school confused and less in touch with reality than when she left. Since leaving Woods in September and being without any programming, Patricia has suffered serious regression reverting to a fantasy world.

Again, defendants' experts do not seriously question plaintiffs' assertion that often SED students suffer regression during breaks in programming. But they do challenge plaintiffs on the issue of causation. Defendants contend that regression, if experienced, is not caused by the absence of programming, but rather by the same factors that they asserted caused SPI children to regress: teacher incompetency, non-functionality of skills and failure of parents to work with their children to maintain skills. For the reasons stated with regard to SPI children, the Court rejects defendants' argument.

SED children frequently share with the SPI population difficulty generalizing skills. As discussed earlier, this problem may partially explain, the significant regression that some SED children experience. And for SED

children their emotional problems combined with programming breaks may also cause regression. For instance, when changes in environment cause a child serious emotional repercussions such as tantrums, ritualistic behavior, and withdrawal, it is not surprising that a break in programming, which completely alters the child's environment, may trigger emotional deterioration. Therefore, from all the evidence the Court finds that regression is often caused by interruptions in the SED child's educational programming.

2. *The Time Required to Recover from Regression Caused by Breaks in Programming*

Having determined that some SPI and SED children significantly regress during breaks in programming, and that they do so to a greater extent than normal children, the next question is how long does it take them to relearn or regain what they lost. Again, there are no statistical studies to guide the Court, requiring it to ground its findings upon expert testimony.

Based upon the experts' opinions, the Court finds that the rate of relearning for all types of children—SED, SPI and non-handicapped—differs from child to child. The time needed to regain lost skills may differ dramatically, even among children who suffer from the same disability and have had similar losses over the same period. Some SPI and SED children return to their pre-break level in a period as short as two weeks, even when they have lost a significant amount of their skills, and then there are other children for whom the process will be long and arduous, consuming sometimes in excess of nine months. Other SPI and SED children will take a month to two months to return to their former level.

Undoubtedly, the rate of relearning is affected by a number of factors, including those that were found to affect learning, as well as the amount and type of regression that the child experiences and the length of time without programming. The evidence also establishes that just as normal children regress less than SPI and SED children do during breaks, they recoup their losses at a faster rate than these handicapped children. SPI and SED children can take months to return to their pre-summer level of skills, but the normal child, if he or she has had a loss, regains lost skills in a few weeks, almost never taking more than a month to do so.

Neither regression over breaks in programming nor long periods of time to regain lost skills are a certainty for the SPI or SED child. Nevertheless, the evidence convinces the Court that some of these children will experience both.

3. *The Effect of Programming Breaks on the Educational Development of SPI and SED Children*

After reviewing the evidence, the Court is convinced that there is no simple answer to the question of "what effect do breaks in programming have on the education of SPI and SED children?" In fact, it is clear that there is not one answer for all children. For some, there is little or no regression during a break of two to two and one-half months. Others experience substantial regression. The time required to recoup lost skills varies from child to child. And so do the effects of the combined regression and time required for recoupment. What may be a significant loss of skills and time required to regain them to one child may not be to another, depending upon the nature of their disabilities, educational programs and forecasts. For example, a child who has a significant amount

to learn before being able to function outside the institution may find a loss of skills which takes two months to regain more detrimental to educational development than a child who loses the same amount of skills which will be relearned over the same time period, but is already prepared to live in a community living arrangement and work in a sheltered workshop.

Nevertheless, plaintiffs have proven through the testimony of their expert witnesses and the experiences of named plaintiffs that one answer is that for some SPI and SED children, including the named plaintiffs, interruptions in programming, because of regression and the length of time it takes to regain lost skills and behaviors, render it impossible or unlikely that they will attain that state of self-sufficiency that they could otherwise reasonably be expected to reach. Although defendants' expert witnesses questioned the validity of plaintiffs' contention that the SPI and SED child's regression is a result of the absence of programming, they did not challenge the theory that severe adverse effects on the child's chances of becoming as independent and self sufficient as otherwise possible result from the loss of important skills and behavioral regression which are not reclaimed for a long time.

As noted earlier, for Gary Armstrong the educational goal is much less lofty than with other SPI children who do not suffer from degenerative diseases. Keeping Gary deinstitutionalized by maintaining his mobility and good behavior is the goal the educators have set for him. The substantial regression that Gary experiences with regard to behavior when his programming is interrupted followed by the extensive time (in some instances nine months) required to recoup those losses makes achieving that goal very difficult. Significantly, all personnel that have

worked with Gary have recommended that he be given in excess of 180 days of education, and representatives of the School District prepared an addendum to Gary's IEP which stated that Gary's program should not be interrupted for more than two to three weeks. From the evidence the Court only can conclude that Gary is an individual who, if he is to be controlled and thereby given a chance to stay out of an institution for as long as otherwise possible, must be provided with an educational program in excess of 180 days.

The uncontradicted testimony of plaintiffs' experts is that at the completion of their schooling and with proper educational programming it is possible for the remaining named plaintiffs to live outside the institution in some kind of community living arrangement or family setting and, for some of them, to work in a sheltered environment. But the Court finds that if these individuals are not given a program in excess of 180 days it is likely that they will not attain these goals.

Since 1970, Natalie Bernard has received summer programming at Elwyn, and since 1973 has been a full-time residential student there, occasionally visiting home. During the summer, the Elwyn program is much less structured than that offered during the "normal" school year; nevertheless, work is still done on development of leisure and self help skills, areas in which Natalie is severely lacking. Defendants called Paul Charles Richardson to testify as to Natalie's need for the summer program. He has a Masters' Degree in special education and, as Director of Special Education at Elwyn, has had frequent contact with Natalie. Although he does not believe that a program in excess of 180 days is necessary for Natalie's development, his opinion is based not on his specific evalua-

tion of her but only on his subscription to the general theory that handicapped children quickly relearn things that they have forgotten. As the Court has rejected the indiscriminate application of this proposition to all SPI and SED children, it does not accord Mr. Richardson's testimony about Natalie's needs much weight, especially in light of contrary testimony of plaintiffs' witness and Elwyn's repeated failure to recommend a change in Natalie's year round placement. Dr. Gordon testified that, because of the regression Natalie would suffer if her educational program were significantly interrupted and the time it would take to regain those losses, Natalie needs more than 180 days of education if she is, at the completion of her formal education, to be able to live in a community home and work in a sheltered environment. The Court finds the evaluation and prognosis rendered by Dr. Gordon reliable, as it is based upon a review of Natalie's records, a personal interview with and extensive examination of her and is made by a person who has extensive experience in the field.

At Elwyn, Richard H. has made substantial progress with his behavioral and emotional problems. But regression from which he will not quickly recover is the predicted effect of breaks in future programming. Dr. Ruttenberg, who has had experience with Richard and many other children with emotional problems like Richard's, believes that Richard needs a controlled environment, with an uninterrupted program, to develop, before his schooling ends, the self-help skills and behavioral controls necessary for life in a supervised group home. If Richard has summer breaks, the doctor reports that the regression that Richard experiences will render him unable to obtain that goal. Having already accepted that

the losses Richard suffers during interruptions in programming cannot be quickly recouped, the Court finds no reason from the evidence to doubt the experienced doctor's conclusion that breaks in programming will preclude Richard from becoming independent of institutional life.

So too is the Court's finding with respect to Mark Anderson. Mark is nineteen years old. Although, while at Devereux, he made considerable progress in coping with his emotional problem, continual strides will be necessary, if at the end of his educational program in two years, he is to live outside the institution's walls. His psychologist, Mark Vnucak, did not believe that Mark could reach that goal if he had to not only make this progress, but also recover from the regression that he experiences in connection with programming breaks. The Court accepts Mr. Vnucak's uncontradicted opinion.

Although Patricia Battle has regressed since leaving the Woods Schools, she still attends a sheltered workshop and manages to perform the tasks assigned to her there. While at school, breaks in programming resulted in Patricia's reversion to a fantasy world where learning was not possible. By maintaining her in an educational environment and providing her with psychotherapy, learning became possible and she gained the skills necessary to work in a sheltered workshop. From this, the Court concludes that without summer programming she would not have reached even this minimal state of independence.

The strong opposition voiced by defendants' experts to an educational program in excess of 180 days was partially based upon their belief that handicapped children, because of their inability to easily generalize, need time to function in their natural environment; they need the op-

portunity to employ what they have learned from their formal education in a more informal context that is likely to approximate their reality upon leaving school. Plaintiffs' witnesses agreed that, generally, handicapped children do need exposure to what lurks outside the institution. Based upon its understanding of the characteristics and learning process of SPI and SED children, gained from the trial of this case, the Court believes that handicapped children usually should be given time to participate in and experience the world that we hope they eventually will inhabit. Nevertheless, and as plaintiffs' experts explained, an education in excess of a 180 days does not mean that these children are denied that opportunity. Plaintiffs do not contend that all children who need more than 180 days of education require 365 days in an institution. For many children the needs for an education in excess of 180 days and the opportunity to function outside of school can be accommodated by such arrangements as part-time school, weekends at home and other short breaks. But, given the disabilities from which SPI and SED children suffer, there may be some children who, for some period of time, need nearly complete isolation from the outside world or exposure to it only in limited doses. For example, Mark Anderson's psychologist indicated that at one time, when he could not cope with what lay outside the institution and would become nervous, frustrated and enuretic upon exposure, Mark was such a child needing constant schooling. If SPI and SED children's individual goals are to be reached, flexibility, balancing of needs and willingness to meet them, are required, rather than unyielding rules.

Having found that the five named plaintiffs are children for whom an educational program in excess of 180

days is required if they are to reach the goals with respect to self-sufficiency that they otherwise could achieve, it must be asked who else needs more time than the normal school year for these purposes. Although the Court is convinced that there are other handicapped children with similar needs, it cannot identify them by disability or characteristics, nor for that matter establish specific guidelines for making that determination. The experts in this case disagreed on many areas, but there was one opinion uniformly shared by them, which was that each handicapped child has unique needs and will respond in his or her own way to a given situation. For the Court to point to one or a number of characteristics, traits or disabilities as identifying those children who need in excess of 180 days to reach the educators' goals would be to ignore this universally accepted principle. Rather, the decision is one that must be made on an individual basis by those familiar with the child.

Dr. Piper, a distinguished expert in the field, testified that SPI children requiring in excess of two months to regain skills lost over the summer should be provided a program in excess of 180 days. For the SED children, Dr. Ruttenberg also tried to establish guidelines. He testified that children who have not "developed a stable relationship, who have not developed a real image of themselves, who have not developed impulse control" need a twelve month program. The Court does not doubt that many children who fall within these categories might need more than 180 days of education if they are to reach the self-sufficiency goals reasonably set by their educators. But having accepted that each SED or SPI child has different needs and must be treated individually, the Court can neither accept that all handicapped children who fall

within the experts' categories need 180 days or only those that fall within these categories need more than 180 days.

Similarly, the type and length of the program in excess of 180 days requires individual consideration. For example, during the summer of 1978, Gary Armstrong received educational programming for five hours a day, three days of the week. As he did not regress, that would appear sufficient to meet the goal of maintaining control over him. But if his needs could no longer be met on this basis, an increase or change in programming would be required so his goals could be reached.

The ultimate factual finding that the Court makes is that defendants' 180 day rule precludes plaintiffs and those similarly situated from receiving an education that is likely to allow them to reach their reasonably set educational goals with respect to self-sufficiency, whether that be merely avoiding institutionalization or living in a community living arrangement and working in a sheltered workshop.

III. THE LAW AND ITS CONCLUSIONS

Plantiffs claim that the 180 day rule imposed by defendants and applied to them and the class they represent violate their rights under the Education for All Handicapped Children, Act of 1975, 20 U.S.C. §1401 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and the regulations promulgated under these statutes. In addition, they contend that defendants' policies and practices offend the Equal Protection and Due Process Clauses of the Fourteenth Amendment and state laws. The Court agrees with plaintiffs that defendants have violated their rights and the rights of the class they represent under the Education for All Handicapped Children Act, and

therefore need not discuss or reach the questions raised under Section 504, the Constitution or state statutes.[4]

A. *Plaintiffs' Claims Under The Education for All Handicapped Children Act of 1975.*

1. *Exhaustion*

Before reaching the merits of plaintiffs' claim under the Education for All Handicapped Children Act of 1975, the question of whether plaintiffs sufficiently complied with the Act's procedural requirements must be addressed. Defendants contend that they have not and that the Court lacks jurisdiction under the Act.

The Court's jurisdiction over this claim allegedly is based on 20 U.S.C. §1415(e)(4) which states that:

> "The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy."

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[4] Although the Court considered addressing and deciding the issue of whether Section 504 of the Rehabilitation Act of 1973 would serve as an alternative basis for relief in this case, in light of the recent decision by the Supreme Court in Southeastern Community College v. Davis, U.S. , 47 U.S.L.W. 4689 (June 11, 1979), it has declined to do so. Briefs in this case were submitted before the Davis decision and, therefore, the parties have not had the opportunity to address the questions of what effect the decision has on this case and what guidance it gives to the Court in interpreting Section 504 and the regulations promulgated thereunder. Since it is not necessary to rule on the Section 504 claim to grant plaintiffs injunctive relief and to declare invalid the 180 day rule, which were the purposes of this phase of the trial, and as the Court believes that it would be beneficial to have the parties' briefs on these issues before deciding the Section 504 claim, it will not rule on that claim at this time. If, at a later time when plaintiffs Bernard and Battle's damages claims

The subsection provides that whenever a complaint has been received by a state or local educational agency or any intermediate educational unit receiving assistance under the Act from a parent or guardian "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child," 20 U.S.C. §1415(b)(1)(E), "the parents or guardian shall have an opportunity for an impartial due process hearing" conducted by the state or local educational agency or the intermediate educational unit, as determined by state law or the state educational agency. 20 U.S.C. §1415(b)(2). If that hearing "is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing." 20 U.S.C. §1415(c). Any party wishing to challenge the findings and decision made at the first mentioned hearing who does not have a right to appeal that decision to the state educa-

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are reached, it becomes necessary to address the Section 504 claims on the merits, the Court will request supplemental briefs in light of Southeastern Community College v. Davis. However, before the Court would address the merits of the Section 504 claim and require those briefs to be submitted, it would have to be convinced that these plaintiffs could not secure complete relief under the Education for All Handicapped Children Act and that Section 504 would allow, if they were to succeed on the merits, for recovery of compensatory damages. Similarly, the Court would demand that such a showing be made before it decided plaintiffs' constitutional and state statutory claims for the purpose of allowing it to rule on the damage issues, as it is contrary to established judicial practice to reach unnecessary questions of law and render advisory opinions, especially when they are of a constitutional nature.

tional agency and any person aggrieved by the findings and decision at the second mentioned hearing is given the right to bring a civil action with respect to the complaint, which action may be brought in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. §1415(e)(2).

By these provisions Congress has required that state procedures be exhausted before the jurisdiction of the courts is invoked under the statute. And in this case, with the exception of the Armstrongs,[5] none of the named plaintiffs nor the class members attempted to employ the state procedures to challenge defendants' policies. Of course, as the Court has already determined in its factual findings, any effort to do so would have been futile given defendants' instructions to its hearings examiners that they could not require an education in excess of 180 days to be provided. Plaintiffs argue that the futility of seeking relief from the state process excuses their failure to exhaust. In response, defendants contend that because the statute only provides for the court's jurisdiction to be established once the procedures have been followed, this Court has no power to expand its jurisdiction by recognizing an exception to the statutory requirements. This argument must be rejected.

[5] It should be noted that it is not clear that even the Armstrongs' efforts to use state procedure would satisfy the Act, for although they requested a hearing at the local level and one was held, they did not appeal from that decision to the state agency. Surely, at the time, it did not seem that they needed to appeal, as the hearing examiner agreed that Gary needed summer programming, and it was not until later that the local agency refused to provide that education. Because of the Court's rulings on the futility issue, it need not decide whether the Armstrongs were required to appeal from the local agency's decision to the state agency before seeking judicial relief.

Courts have generally recognized that failure to exhaust administrative remedies may be excused, allowing the individual recourse to the courts, when it is clear that pursual of the administrative remedies would be futile. *McKart v. United States,* 395 U.S. 185 (1969); *Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle,* 571 F.2d 359 (3d Cir. 1978) *cert. denied,* U.S. , 99 S.Ct. 115 (1979); *Howard S. v. Friendswood Independent School District,* 454 F. Supp. 634 (S.D. Tex. 1978); *Fialkowski v. Shapp,* 405 F. Supp. 946 (E.D. Pa. 1975). But judicial precedent is not the Court's sole source of guidance on the issue of whether an exception to the requirements of the Education for All Handicapped Children Act can be recognized based on futility. Clear legislative instruction exists. In addressing the Senate during its debate on the Conference Report on the Education for All Handicapped Children Act, Senator Williams, author of the Senate bill and Chairperson of the Labor and Public Welfare Committee, explained:

> "Mr. President, with regard to complaints, I want to underscore that exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter." 121 Cong. Rec. 37416 (1975).

During the House and Senate debates on the legislation no one questioned the accuracy of Senator Williams' remarks. After considering this legislative history and the judicial reaction to exhaustion requirements in the presence of futility, the Court finds it appropriate to acknowledge an exception to the requirements of 20 U.S.C. §1415 when resorting to state procedures clearly would be futile.

To find otherwise, would impose upon the parents and guardians of handicapped children an unnecessary and unjustified burden when they are faced with situations where prompt relief is often required. As defendants admit that the Pennsylvania due process procedures would have been of no avail to plaintiffs, the Court holds that named plaintiffs' and the class's failure to exhaust state remedies does not bar this suit.[6]

2. *The Education for All Handicapped Children Act and the 180 Day Rule*

For state educational agencies, the Education for All Handicapped Children Act serves both as a source of funds and of obligations. Besides supplying them with federal monies to help support the education of handicapped children, the Act imposes certain duties on these state agencies and the local and intermediate educational agencies which receive funds from them. One of the major responsibilities of these agencies is assuring all handicapped children provision of a "free appropriate public education," 20 U.S.C. §1412(1). And, under the Act, these children's parents and guardians have a right to secure its provision. 20 U.S.C. §1415. By defendants' inflexible application of

[6] Since named plaintiffs' and the class's failure to exhaust administrative remedies is excused by futility, the Court need not decide whether individual class members, in other circumstances, must exhaust state procedures. Nevertheless, from the legislative history, it would seem that such a requirement would not be imposed under the Act. Continuing his remarks from the ones quoted above, Senator Williams stated:

> "Nor is it intended that the availability of these administrative procedures be construed so as to require each member of the class to exhaust such procedures in any class action brought to redress an alleged violation of the statute." 121 Cong. Rec. 37416 (1975).

the 180 day rule, plaintiffs claim that defendants have failed to meet their responsibilities under the Act and deny plaintiffs and members of the class the right to a free appropriate public education. Although at least one other court has commented on the issue,[7] this appears to be the first occasion that a court has had to decide whether the Education for All Handicapped Children Act requires the state, and its local and intermediate units, in at least certain instances, to provide an education to handicapped children in excess of 180 days.

Simply put, the issues are what is an appropriate education under the Act and does the 180 day rule interfere with its provision. The Act defines a "free appropriate public education" as:

> "... special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program. . ." 20 U.S.C. §1401(18). *See also* 45 C.F.R. 121a.4 (1978).

The Act's definition of "special education" gives further guidance as to what an appropriate education consists of:

> "The term 'special education' means specially designed instruction, at no cost to parents or guard-

[7] In the Matter of Scott K, 92 Misc. 2d 681, 400 N.Y.S. 2d 289, 291 (Fam. Ct. 1977), in dicta the Court indicated that under this Act and regulations the appropriate governmental body could be required to provide a handicapped child free residential placement for the full twelve months of a year, if the needs of the child required it.

> ians, *to meet the unique needs* of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. §1401(16) (emphasis added). *See also* 45 C.F.R. 121a.14 (1978).

Although this additional statutory directive seems to clarify the ingredients of an appropriate education, it is still sometimes difficult to determine precisely what the state is required to provide.

By its terms, the Act appears to demand that the state supply instruction designed to meet all of the handicapped child's "unique needs" without limitation. But, even in light of this broad statutory language, defendants contend that they must only offer instruction which satisfies certain of the child's unique needs, namely those which must be met so that the child can share and benefit from equal educational programming and services with non-handicapped students; defendants strongly deny that they must furnish instruction that meets needs that arise solely when the handicapped seek to reach their maximum potential. Plaintiffs obviously disagree.

To determine which unique needs of the handicapped child must be met by the special instruction, thereby allowing the Court to resolve what instruction is necessary, it is useful to approach the problem by asking what is the goal of the education that the Act requires the state to provide. Needs arise in context of achieving certain ends, and surely there are certain ends, and not others, that are the concern of this legislation. Therefore, the Court must resolve whether the purpose of the special instruction mandated by the Act is to allow these children to reach

their maximum potential, to permit them to share equally in programs provided to non-handicapped students or to reach one or several other goals.

Although the statute does not directly speak to this question, the legislative history does. This legislation was considered and enacted after the landmark decision in *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania,* 334 F. Supp. 1257 (E.D. Pa. 1971), where the court guaranteed handicapped children a right to a free publicly supported education and recognized that:

> "all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care." *Id.* at 1259.

By enacting the Education for All Handicapped Children Act, Congress sought not only to aid the states in their provision of an education to handicapped children, but also, as articulated by the congressmen most intimately involved with the legislation, to achieve equal educational opportunity and to allow handicapped children to achieve at a minimum what the *PARC* court found possible for most: self sufficiency and independence from caretakers.

Throughout the debates, there are repeated references to this latter goal. Senator Williams, when the Senate was considering on June 18, 1975, the Senate version of the Act, explained:

> "Failure to provide appropriate educational services for all handicapped children results in public

> agencies and taxpayers spending billions of dollars over the lifetime of these individuals to maintain them as dependents in minimally acceptable lifestyles. Yet, providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." 121 Cong. Rec. 19492 (1975).

And later, in the debates concerning the Conference Report on the Act, he agreed with the Secretary of Health, Education and Welfare, that the purpose and goal of the Act was to allow handicapped persons to be "productive citizens, capable of contributing, and even more, capable of self-respect and pride which they so rightly deserve." 121 Cong. Rec. 37416 (1975). In the Senate and in the House, his sentiments were echoed. The Senate Report, in its discussion of the need for legislation concerning handicapped children's education, indicated at least one of the goals towards which educational services to the handicapped were to be directed.

> "With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep. No. 94-168, 94th Cong., 1st Sess., *reprinted* in [1975] U.S. Code Cong. & Ad. News 1425, 1433.

Senator Randolph, recognizing the potential of handicapped children, implored in his discussion of the conference bill, that "[w]e must act now to give these children the educational services they need to compete in today's changing

world." 121 Cong. Rec. 37410 (1975). And in the House, Congressman Harkin reiterated these thoughts when he stated:

> "With proper educational services provided now, at a young age, these children can become productive citizens contributing to society instead of being left as burdens on our society." 121 Cong. Rec. 25541 (1975).

As noted, throughout the Congressional debates there is a strongly expressed concern for securing through education the handicapped child's achievement of self-sufficiency. This legislative history convinces the Court that as do the educators of handicapped children, Congress recognized attaining self-sufficiency as a goal of an appropriate education for handicapped children and sought to secure it by enacting the Education for All Handicapped Children Act. The Court concludes, therefore, that the unique needs that must be met by the educational program include those that, if satisfied, allow the child, within the limits of his or her handicap, to become self-sufficient.

This standard for judging a state's program does not require the state to provide a program which is designed to allow each handicapped child to reach his or her maximum potential in every respect. Rather, it is limited to those areas with which Congress expressed concern. The congressional intent was to provide for that education which would leave these children, upon school's completion, as independent as possible from dependency on others, including the state, within the limits of the handicapped condition.[8]

[8] By enunciating this standard, the Court does not mean to imply that it is the only one that is used to evaluate whether a program is "appropriate" and meets the "unique needs" of the

Evaluating defendants' 180 day rule by whether it prevents defendants from providing a program of instruction designed to meet the unique needs of handicapped children in their quest for self-sufficiency, it is apparent, in light of court's factual findings, that the rule must fall and that it can no longer be inflexibly applied by hearing examiners in "due process" hearings if plaintiffs are to be afforded the procedural safeguards provided for in the Act. *See,* 20 U.S.C. §1415. As the Court found earlier, for certain handicapped children, including named minor plaintiffs, a program in excess of 180 days is required if they are to attain that level of self-sufficiency that is otherwise possible given an appropriate education.

Defendants cannot defend their 180 day rule by asserting that it is applied equally to handicapped as well as non-handicapped children. Equality of services and programs is not the test for determining whether an appropriate education is being provided by the state. The Act explicitly, in a number of instances, requires that the state provide services to handicapped children that it does not give to non-handicapped children, e.g., hospital and home instruction, *see* 20 U.S.C. §1401(16), and also instructs, without mentioning the services provided to normal children that an educational plan be developed on an in-

handicapped child. Of course, Congress may have had other goals that it wished the educational program to satisfy (including allowing the handicap [ped] child access to the programs available to non-handicapped students) which may be considered in determining whether a program meets the unique needs of the handicapped child. In this case, as the 180 day rule prevents plaintiffs and members of their class from attaining that level of self-sufficiency that they could otherwise achieve given their handicap, there is no need to discuss other goals and standards by which an educational program is to be judged.

dividual basis with attention paid to the handicapped child's needs. It is apparent that Congress recognized that "equal" services does not always provide handicapped children with an "appropriate education" and, thus by requiring defendants to meet the handicapped child's "unique needs", demanded that, in certain instances, more be provided.

Therefore, the Court must declare that the 180 day rule deprives plaintiffs and the class they represent of an "appropriate education" and violates the Education for All Handicapped Children Act. This decision necessitates certain injunctive relief, such as instructions to hearing officers and notification to parents. The Court will direct counsel, the parties, and their experts to discuss these issues and if possible, submit a joint proposed order on class wide injunctive relief that is consistent with this decision. It is not clear to the Court, what relief can be offered to plaintiff class for this summer; the parties should also explore this question and report to the Court on it.

As named plaintiffs have proven their need to an education in excess of 180 days, defendants will be ordered to provide one to each of the named plaintiffs except for Patricia Battle, who is no longer entitled to a public or publicly funded education. Although the Court will be willing to meet with counsel to discuss the length and terms of these named plaintiffs' educational program and issue an appropriate order, again it will instruct the parties to meet as quickly as possible and submit a joint plan, if possible, that adequately meets these children's needs.

The Court has found all counsel extremely cooperative and understanding of the issues and their importance. Therefore, by asking them and the parties to discuss with

the educational experts the appropriate relief that should be ordered in this case and to report their conclusions to the Court, the Court, whose ultimate responsibility it is to enter a final order in these cases, anticipates that it will be able to render more effective and more appropriate relief.

(s) Clarence C. Newcomer
Clarence C. Newcomer

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-172

PATRICIA ARMSTRONG, et al.

v.

CARYL KLINE, et al.

Civil Action No. 78-132

PATRICIA SUE BATTLE, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

Civil Action No. 78-133

NATALIE BERNARD, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, to wit, this 21st day of June, 1979, in accordance with the accompanying findings of fact and conclusions of law, it is hereby DECLARED that the refusal by the Department of Education (DOE) of the Commonwealth of Pennsylvania and the Philadelphia, Abington

and Marple Newtown School Districts to provide or fund the provision of a program of special education and related services in excess of 180 days per year to any handicapped child violates the class's and named plaintiffs' right to a "free appropriate public education" under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 *et seq.* It is further DECLARED that the policies and practices of the DOE and these school districts, of instructing all hearing officers who preside over special education due process hearings that they have no authority to, and may not, order a program of special education and related services for any handicapped child in excess of 180 days, deny the class and named plaintiffs their right to adequate procedural safeguards under the Education for All Handicapped Children Act.

Therefore, it is hereby Ordered that:

1. Defendants are to provide plaintiffs Gary Armstrong, Richard H., Mark Anderson and Natalie Bernard with a public or publicly funded appropriate educational program in excess of 180 days that is consistent with the terms of this opinion. As soon as possible, all counsel, after consulting with the parties and those experts they deem appropriate, shall meet and discuss the length and terms of these named minor plaintiffs' educational program and submit, if possible, a joint plan and if not possible separate plans for the Court's consideration. A further Order with respect to named plaintiffs' educational programs shall be issued thereafter.

2. Defendants shall not refuse to provide or fund the provision of a program of special education and related services in excess of 180 days per year to any handicapped

child who is a member of the class, and shall instruct its hearing officers accordingly. All counsel, after consulting with the parties and those experts they deem appropriate, shall meet and discuss what injunctive class-wide relief they deem appropriate in light of the Court's decision and submit as soon as possible either joint or separate proposals for the Court's consideration. A further Order will then be issued.

3. A conference with Court and counsel will be held on Friday, June 22, 1979, at 11:00 a.m. in chambers, to discuss this Order and to set the time limits under which it shall be complied with.

AND IT IS SO ORDERED.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

2. ORDER (J. NEWCOMER) FOR SECRETARY OF EDUCATION AND PHILADELPHIA SCHOOL DISTRICT TO FUND 365-DAY EDUCATION FOR MARK ANDERSON, GARY ARMSTRONG AND RICHARD H.
(Filed July 5, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-172

ARMSTRONG, et al.

v.

KLINE, et al.

ORDER

AND NOW, to wit, this 5th day of July, 1979, upon agreement of the parties, it is hereby Ordered that:

(a) The Defendants Secretary of Education and Philadelphia School District shall fully fund the provision of a year round seven day per week appropriate program of special education and related services for minor Plaintiff Mark Anderson in his current residential placement at the Devereux Foundation, without cost to Plaintiffs. Said placement shall not be changed by Defendants unless and until such time as the parties agree or all due process procedures have been completed.

(b) The Defendants Secretary of Education and Philadelphia School District shall provide to minor Plaintiff Gary Armstrong a free appropriate program of special education and related services during the summer months of 1979. Said program shall be five (5) hours per day, three (3) days per week for a period of six (6) weeks, beginning the week of July 9, 1979 and continuing through the week of August 17, 1979. Said program shall be provided in an air conditioned facility and shall be in accordance with Gary's IEP.

(c) The Defendants Secretary of Education and Philadelphia School District shall provide or fully fund the provision of a year round seven day per week appropriate program of special education and related services for minor Plaintiff Richard H. without cost to Plaintiffs. Said program shall be provided in an appropriate residential facility and shall commence no later than July 9, 1979. Said placement shall thereafter not be changed by Defendants unless and until such time as the parties agree or all due process procedures have been completed.

AND IT IS SO ORDERED.

(s) Clarence C. Newcomer,
Clarence C. Newcomer, J.

3. ORDER (J. NEWCOMER) FOR SECRETARY OF EDUCATION AND MARPLE NEWTOWN SCHOOL DISTRICT TO FUND 365-DAY EDUCATION FOR NATALIE BERNARD (Filed July 18, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-172, 78-132, 78-133

ARMSTRONG, et al.

v.

KLINE, et al.

ORDER

AND NOW, to wit, this 17th day of July, 1979, in accordance with this Court's Findings of Fact and Conclusions of Law, it is hereby Ordered that the Defendants Secretary of Education and Marple Newtown School District shall fully fund the provision of a year-round seven-day-per-week appropriate program of special education and related services for minor plaintiff Natalie Bernard in her current residential placement at the Elwyn Institute without cost to plaintiffs. Such placement shall not be

changed by defendants unless and until such time as the parties agree or all due process procedures have been completed.

AND IT IS SO ORDERED.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

4. REMEDIAL ORDER No. 1 (J. NEWCOMER) (Filed August 1, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 78-172, 78-132, 78-133

ARMSTRONG, et al.

v.

KLINE, et al.

REMEDIAL ORDER No. 1

AND, NOW, to wit, this 1st day of August 1979, it is hereby Ordered that:

1. Defendant Secretary of Education (hereinafter "Secretary") shall review or insure the review on a priority basis of certain school-aged members of the plaintiff class (hereinafter referred to as "priority class members") to determine their need for a program of special education and related services in excess of 180 days per year. Said priority class members shall be defined as follows:

> All handicapped school-aged persons who have been placed by the Department of Education and/or

their local school districts and intermediate units in day or residential education programs operating on a year round basis without admitting or excepting children for a lesser period of time and whose parents or guardians are presently paying for programming in excess of 180 days.

2. Within seven calendar days of the date of this order, the Secretary shall locate all priority class members described in ¶1 above and immediately inform counsel for plaintiffs of the name, school district, type and location of current placement of each class member so located.

3. Within seven calendar days of the date on which this Court approves guidelines for identifying class members who require programming in excess of 180 days per year, the Secretary, either directly or through local school districts and intermediate units, shall notify in writing the parents or guardians of all priority class members of the content of the opinion and order of June 21, 1979, this remedial order, their rights hereunder and the applicable guidelines. Said notice shall also inform the parents or guardians of the scheduling of an IEP review conference to be held within three weeks of that notice to determine whether the student requires programming in excess of 180 days per year. A proposed form of the notice shall be submitted by the Secretary to the Court, with copies to all counsel by August 17, 1979.

4. The Secretary shall insure that within seven days of the convening of each IEP conference he receives notice of each priority class member who is identified by the IEP team as requiring special education programming in excess of 180 days per year; the Secretary then shall have ten (10) days to review the decision of the IEP team.

5. By October 15, 1979, the Secretary shall inform the Court and counsel for plaintiffs of the names, districts, and current placement of all priority class members identified by both the IEP conference and the Secretary as requiring programming in excess of 180 days per year.

6. For all priority class members identified by the IEP conference and the Secretary as requiring programming in excess of 180 days, the Secretary shall reimburse their parents or guardians for any expenses incurred in maintaining their children in their special education placements since the date of this Order, including the payment of any arrearages whch have accumulated since that date. The question of whether these parents and guardians are entitled to be reimbursed for all such expenses accruing after June 21, 1979, but before the date of this Order, will be determined by the Court after the parties file briefs on this issue on or before August 24, 1979.

7. The form of notice to be given to the parent or guardians of all priority class members identified by the IEP conference and the Secretary as requiring programming in excess of 180 days with regard to their right to reimbursement, shall be determined after the Court resolves the question of whether these parents and guardians are entitled to be reimbursed for all expenses accruing after January 21, 1979, but before the date of this Order.

8. The parents or guardians of all priority class members located pursuant to ¶2 above but not identified by the IEP conference and/or the Secretary as in need of programming in excess of 180 days per year shall, within five calendar days of either the adverse decision of the IEP conference or the Secretary, which ever is the latter, be notified of the adverse decision and of their right to

request a due process hearing at which the decision may be challenged. Said due process hearing shall be convened within fifteen (15) days of a parent's or guardian's request, and a decision must be rendered no more than twenty (20) days thereafter. In all instances in which the decision of the hearing officer is in favor of a priority class member, the parent or guardian shall be entitled to reimbursement as set forth in ¶6 above. In any instance in which the decision of the hearing officer is adverse to a priority class member the parent or guardian may appeal pursuant to existing due process procedures. If the Secretary, after a decision at a due process hearing adverse to him, decides to appeal and is successful in that appeal, he may seek to recover the amount paid to the parents or guardian pursuant to this paragraph for programming in excess of 180 days per year.

AND IT IS SO ORDERED.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

5. REMEDIAL ORDER NO. 2 (J. NEWCOMER)
(Filed September 5, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-172, 78-132, 78-133

ARMSTRONG, et al.

v.

KLINE, et al.

REMEDIAL ORDER NO. 2

After consideration of the Order proposed by Plaintiffs and the objections raised by defendants, it is hereby Ordered that:

1. The Defendant Secretary of Education (hereinafter "Defendant Secretary") shall insure that each school-aged handicapped person (hereinafter "handicapped student") who requires a program of special education and related services in excess of 180 days per year receives such a program, without cost to his/her parents or guardians.

2. For the purposes of this Order, a handicapped student shall be deemed to require an education program

in excess of 180 days per year if he/she meets the following standard:

> A handicapped student is entitled to an education program in excess of 180 days per year if regression caused by an interruption in educational programming, together with the student's limited recoupment capacity, renders it impossible or unlikely that the student will attain the level of self-sufficiency and independence from caretakers that the student would otherwise be expected to reach in view of his/her handicapping condition.

3. Within twenty (20) days from the date of this Order, Defendant Secretary shall notify, either directly or through local districts and/or intermediate units, all Department of Education special education officials, all Hearing Officers employed by the Department of Education who preside at special education due process hearings, all school district superintendents, all intermediate unit directors, all school principals, and all special education and related services in excess of 180 days per year must be provided to all handicapped students meeting the standard described in ¶2 above. Said notification shall inform said persons that, in determining which handicapped students require, and, therefore, must receive such programming, they shall utilize the "Guidelines for Identifying School-Aged Persons in Need of Education Programming in Excess of 180 Days Per Year" (hereinafter "Guidelines") which are attached hereto as Exhibit "A" and incorporated herein as if fully set forth. These guidelines have been submitted by plaintiffs, in consultation with their expert witnesses, and reviewed and commented upon by defendants. Copies of the Guidelines shall be provided by Defendant Secretary to all Hearing

Officers and state and local personnel who are or may be involved with making special education decisions for handicapped students.

4. Within twenty (20) days from the date of this Order, the Defendant Secretary shall amend the Department of Education's Hearing Officers' Manual to include the Guidelines and instructions as to their use.

5. By October 15, 1979, the Defendant Secretary, either directly or through local school districts and/or intermediate units, shall notify by mail the parents or guardians of each handicapped student with the Commonwealth who has been diagnosed as autistic, severely emotionally disturbed, severely and profoundly impaired, severely or profoundly mentally retarded, or severely multihandicapped of this Court's Orders and of their rights thereunder. Said notice shall inform them of their right to request an IEP team review to determine if their child is entitled to a special education program in excess of 180 days per year. Said notice shall also inform the parents or guardians of the applicable standard to be applied to such review.

6. The Defendant Secretary shall insure that each IEP review conference requested by a parent or guardian pursuant to ¶5 above shall be held within thirty (30) days of a school district's receipt of such request, unless an extension of time is agreed to by the parties. The IEPs of all children determined to require programming in excess of 180 days per year shall be revised accordingly and the Defendant Secretary shall thereafter insure that such programs are provided. The parents or guardians of each child determined not to require programming in excess of 180 days per year shall be informed of their right to initiate due process procedures regarding that determination.

7. By December 15, 1979, the Defendant Secretary, either directly or through local school districts and/or intermediate units, shall notify the parents or guardians of all handicapped students within the Commonwealth who, as of the beginning of the 1979-80 school year, are enrolled in full time, self-contained special education programs of this Court's Opinion and Order of June 21, 1979, the standard set forth in ¶2 above, and of the procedures by which they may determine their child's rights thereunder. Said notification may be accomplished by mail, by inclusion with progress report cards, or by such other means designed to insure personal receipt by parents.

8. The Defendant Secretary shall submit to the Court and counsel for plaintiffs the following reports regarding the implementation of this Order on the following dates:

a. By November 15, 1979, by handicapping condition and local school district, the number of students whose parents requested review pursuant to ¶5 above.

b. By January 7, 1980, the number, handicapping conditions, local school districts, and present educational placements of all students who, as a result of the IEP review conferences held pursuant to ¶¶5 and 6, above, were determined to require programming in excess of 180 days per year, and the number of students by handicapping conditions and local school districts determined not to require such programming whose parents or guardians have initiated due process procedures.

c. By December 15, 1979, a draft plan by which the Department of Education will monitor the im-

plementation of the June 21, 1979, Opinion and Order and this Remedial Order. Counsel for plaintiffs shall have an opportunity to comment on the draft plan; a final plan shall be submitted by the Defendant Secretary to counsel for plaintiffs and filed with this Court by January 15, 1980.

d. By May 1, 1980, by handicapping condition and local school district, the number of students within the Commonwealth determined eligible for programming in excess of 180 days, the types of programs to be provided, and the means by which such programs shall be provided without cost or liability to the students, their parents or guardians.

9. The proposed form and content of all notices required by ¶¶3, 5 and 7 above shall first be submitted by the Secretary to the Court, with copies to counsel for plaintiffs.

AND IT IS SO ORDERED.

Dated: 9/5/79

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

EXHIBIT "A"

GUIDELINES FOR IDENTIFYING SCHOOL-AGED PERSONS IN NEED OF EDUCATION PROGRAMMING IN EXCESS OF 180 DAYS PER YEAR

I. INTRODUCTION

In June, 1979, the federal District Court for the Eastern District of Pennsylvania issued a decision in the class action lawsuit, *Armstrong v. Kline.* The Court ruled that certain handicapped students require a continuous program of special education and related services in excess of the normal 180 day school year and that any handicapped student who requires such a program is entitled to receive it from the Department of Education and their local school district without cost or other financial liability.

The *Armstrong* Court held that, under federal law, each handicapped student in the Commonwealth is entitled to receive a "free appropriate public education," and recognized that, to have meaningful access to a public education, handicapped children may require services or types of educational programs which are different from those needed by their non-handicapped peers. Moreover, the Court found that each handicapped child is an individual with unique problems and individual learning characteristics. With these factors in mind, the Court held that a "free appropriate public education" for certain handicapped students necessitates a program of special education and related services in excess of 180 days per year.

The Court found that handicapped children, like their non-handicapped peers, are educated with certain objectives in mind, and it is towards these goals that educational programming is directed. While goals or objectives may differ depending on the child and the nature and severity of his/her handicapping condition, an "appropriate program of special education and related services" must, in all instances, at minimum, be directed towards the attainment of self-sufficiency, independence from caretakers, and avoidance of institutionalization.

Therefore, to comply with the Court Order and to assure uniformity in decision making, the following guidelines have been developed and are intended for use by school district, intermediate unit, and Department of Education special education officials, parents and other IEP team members, and special education hearing officers who are involved with determining which handicapped students are in need of continuous programs of special education and related services in excess of the normal 180 day school year, and the type and length of the programs required. Any handicapped student who requires such a program is entitled to receive it without cost, and the need for and description of the program must be contained in the student's IEP.

II. STANDARD TO BE APPLIED IN DETERMINING WHICH CHILDREN REQUIRE PROGRAMMING IN EXCESS OF 180 DAYS PER YEAR

Some handicapped children are particularly vulnerable to interruptions in their special educational programs, and will show a sharp decline or regression in their learn-

ing and development if those programs are interrupted. "Learning" for handicapped children includes the acquisition of self-help, academic, socialization, and vocational skills, the control of inappropriate behaviors, and the development of appropriate behaviors which foster the learning experience. Certain of these "vulnerable" children cannot easily regain or recoup their educational losses if their programs are interrupted.

Since each handicapped child learns differently, progresses, regresses and recoups at different rates and has a different capacity to obtain self-sufficiency, it is not possible to set down any absolute rules which automatically dictate that all children with a particular handicap or IQ level have a need for continuous programming in excess of 180 days per year; rather, this decision, as well as a determination regarding the amount of programming required, must be made on an individual basis. However, in analyzing the various factors which are relevant to determining a handicapped child's needs and deciding whether he/she requires educational programming in excess of 180 days per year, the following is the standard which must be applied.

> A handicapped student is entitled to an education program in excess of 180 days per year if regression caused by interruption in educational programming, together with the student's limited recoupment capacity, render it impossible or unlikely that the student will attain the level of self-sufficiency and independence from caretakers that the student would otherwise be expected to reach in view of his/her handicapping condition.

III. FACTORS WHICH ARE RELEVANT TO DETERMINING WHETHER A HANDICAPPED STUDENT REQUIRES EDUCATIONAL PROGRAMMING IN EXCESS OF 180 DAYS PER YEAR AND THE TYPE OF PROGRAMMING

As was stated above, the determination as to whether a child requires educational programming in excess of the normal school year must be made on an individual basis. However, there are certain characteristics or factors which alone or in combination make it more likely that a child will meet the standard described above and thus need such programming.

Some of these factors are as follows:

1. *Nature of Handicapping Condition*

Although children who meet the above standard may have any handicapping condition or combination of handicapping conditions, children with certain disabilities, which require consistent, highly structured programs, may be predisposed to regression when their programs are interrupted. These same children may also have limited recoupment capacity. Such handicapping conditions include childhood autism, severe emotional disturbance, severe or profound mental retardation, degenerative impairments with mental involvement, and severe multiple handicaps. As part of the annual IEP review process of each child who has been diagnosed or described as having one of the above impairments, the IEP team shall consider the child's need for continuous educational programming in excess of 180 days per year.

2. *Severity of Handicapping Condition*

Although "vulnerable" children with limited recoupment capacity can exist among the more moderately impaired, they are more likely to be among the more severely handicapped. The most severely emotionally disturbed children, for example, are more likely to revert to lower functioning levels or to exhibit inappropriate behaviors, such as extreme withdrawal, anxiety reactions, or fetishes which seriously interfere with learning, when their program is interrupted. For many of these children, each successive interruption in programming and consequential regression also reduces the child's motivation and trust and may lead to an irreversible withdrawal from the learning process. Severely or profoundly retarded children are more likely to have limited relearning capacity. Finally, these severely impaired students are most likely to have difficulty attaining the goals of self-sufficiency and independence from caretakers, and to need additional help and support to reach those goals.

3. *Areas of Learning*

Just as every child learns, regresses, and recoups at different rates, he/she may also learn, regress, or recoup certain skills or behaviors at different rates than others. Certain skills or behaviors are particularly essential to meeting the goals of self-sufficiency. For example, basic self-help skills, such as toileting or eating, are essential for minimal independence; the development of stable relationships, impulse control and appropriate peer interaction is necessary for community living. Therefore, if a child would suffer a significant regression/recoupment loss in a skill or behavior which is particularly crucial to

reaching the goal of self-sufficiency and independence from caretakers, the child requires continuous education programming in that skill or behavior area.

Another relevant factor is the extent to which the child has mastered and consolidated an important skill or behavior at the point when the program is broken since behaviors or skills which have not yet been generalized, mastered, and consolidated are more easily lost, a child is more likely to regress in that skill or behavior area if his/her programming is interrupted before mastery and consolidation have been achieved.

4. *Capacity of Parent or Guardian to Monitor Programming and Prevent Regression*

A parent or guardian may be unable to maintain a child's level during a break in programming because of the complexity of the program, time constraints, lack of expertise, or other reasonable reasons, and this factor is relevant to whether a child can be expected to regress. Also relevant to a parent's ability to maintain skills during interruptions in programming is the child's stage of mastery of crucial skills or behavioral controls as of the point of the interruption in programming.

Where appropriate, school districts and/or intermediate units should consider offering parent training programs to help parents attempt to maintain their child's level during breaks in programming. School districts and intermediate units should also consider offering the provision of support services in the home, either directly or in cooperation with the Department of Public Welfare or Office of Mental Health/Mental Retardation, if such services will prevent the child's regression during a break

in programming. School districts and intermediate units are free to utilize the resources of other public or private agencies in order to meet the child's needs, so long as there is no cost or financial liability to the child's parents or guardians.

5. *Extent of Regression or Recoupment*

Again, there is no precise measure of the amount of time which, if lost through the regression and limited recoupment characteristics of a child, necessarily dictates that the child receive education programming in excess of 180 days per year.

IV. TYPE AND LENGTH OF PROGRAM REQUIRED

As with the determination of need for programming in excess of 180 days per year, the type and length of the program which a child requires must also be made on an individual basis. Certain children are unable to sustain more than a minimal number of short breaks in their program without suffering severe regression and disruption in their learning process. These children require a consistent program of special education and related services on a year round basis which does not significantly differ during the summer months from that provided during the normal school year.

Other children can sustain short breaks, such as weekends or the traditional one week winter or spring vacation, without significant losses, and may only have a regression/recoupment problem when their program is interrupted for a longer period of time. Such a child requires a year round continuous program of special education and related services which is designed to maintain

the child's level in those skill and behavior areas identified as crucial if the child is to reach his/her goals of self-sufficiency and independence.

It should be remembered that most handicapped children, like their non-handicapped peers, will benefit from school vacations; breaks in formal programming allow most children to generalize into their natural environment the skills and behaviors learned in school. Further, for most children, "learning" takes place outside the formal school environment as well. For children who severely regress during a break in programming and have limited recoupment capacity, however, the break in programming is detrimental rather than beneficial to the overall learning process and the achievement of the goals of self-sufficiency and independence from caretakers.

The length beyond 180 days per year of a child's education program should be, at minimum, the amount of time necessary to provide the child a meaningful opportunity to achieve his/her goals with respect to self-sufficiency and independence from caretakers. The program itself should be consistent with the child's IEP and provide all programs and related services necessary to meet those goals.

V. SOURCE OF INFORMATION FOR DETERMINATION

Reliable sources of information regarding a child's educational needs, propensity to regress, recoupment potential, and capacity for achieving self-sufficiency include the following:

1. Experience of persons who work with the child, such as teachers, parents, and therapists;

2. Empirical data, if any, maintained on the child, including pre-and post-test IEP data;

3. Medical, psychological, or educational records of the child from public and private sources;

4. Prognosis or opinions of educators, medical personnel, parents, and others who work with the child.

An actual experience of severe regression with significant recoupment time, particularly in the context of a formal special education program, is not necessary in order to establish that a child requires continuous programming in excess of 180 days per year. Such a prognosis can be made based on the type of data described above if it appears that the child demonstrates one or more of the factors or characteristics described in §III above.

VI. CONCLUSION

After consideration of the factors and characteristics set out in §III, the relevant personnel shall determine whether the child requires a continuous program in excess of 180 days per year and, if so, the type and length of the program required. Such a determination, like other special education decisions, must be based on the individual child's unique needs. Since a child's needs may change over time, a determination that a child requires continuous programming does not remain fixed for his/her entire education career. Likewise, the initial decision may be that the child does not require such programming, but if later experience with the child in fact leads to a contrary conclusion, the child's IEP should be revised accordingly.

6. ORDER (J. NEWCOMER) ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANTS (BATTLE v. COMMONWEALTH)

(Filed September 5, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-132

PATRICIA SUE BATTLE, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, to wit, this 4th day of September, 1979, in accordance with the Findings of Fact and Conclusions of Law filed on June 21, 1979, it is hereby Ordered that judgment is entered in favor of the plaintiffs and against the defendants in the above captioned matter.

AND IT IS SO ORDERED.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

7. ORDER (J. NEWCOMER) ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANTS (BERNARD v. COMMONWEALTH)
(Filed September 5, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-133

NATALIE BERNARD, et al.

v.

COMMONWEALTH OF PENNSYLVANIA

ORDER

AND NOW, to wit, this 4th day of September, 1979, in accordance with the Findings of Fact and Conclusions of Law filed on June 21, 1979, it is hereby Ordered that judgment is entered in favor of the plaintiffs and against the defendants in the above captioned matter.

AND IT IS SO ORDERED.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

8. ORDER (J. NEWCOMER) ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANTS (ARMSTRONG v. KLINE) (Filed September 5, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-172

ARMSTRONG, et al.

v.

KLINE, et al.

ORDER

AND NOW, to wit, this 4th day of September, 1979, in accordance with the Findings of Fact and Conclusions of Law filed on June 21, 1979, it is hereby Ordered that judgment is entered in favor of the plaintiffs and against the defendants in the above captioned matter.

AND IT IS SO ORDERED.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

9. OPINION OF THE COURT (3d CIR.) (J. HUNTER), CONCURRING OPINION (J. VAN DUSEN) AND CONCURRING AND DISSENTING OPINION (J. SLOVITER) (Filed July 15, 1980)

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 79-2158, 79-2188, 79-2189, 79-2190
79-2568, 79-2569, 79-2570

PATRICIA SUE BATTLE, by her parents and next friend JUNE E. BATTLE and DONALD E. BATTLE and JUNE E. BATTLE and DONALD E. BATTLE in their own right, on behalf of themselves and all others similarly situated

v.

COMMONWEALTH OF PENNSYLVANIA, CARYL M. KLINE, Secretary of Education, Commonwealth of Pennsylvania, Department of Education

THE ABINGTON SCHOOL DISTRICT, DR. CARL B. HOFFMAN, Superintendent of the Abington School District,

THE WOODS SCHOOLS, DR. HAROLD S. BARBOUR, President of the Woods Schools,

(D.C. Civil No. 78-0132)

BERNARD, NATALIE, a minor, by her parents and natural guardians BERNARD, CLARA M. and BERNARD, ROBERT A. in their own right, on behalf of themselves and all others similarly situated

v.

COMMONWEALTH OF PENNSYLVANIA KLINE, CARYL, SECRETARY OF EDUCATION COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION,

THE MARPLE NEWTOWN SCHOOL DISTRICT, SANNER, GLENN Superintendent of the Marple Newtown School District,

ELWYN INSTITUTE, CLARD, DR. GERALD R., President of the Elwyn Institute

(D.C. Civil No. 78-0133)

ARMSTRONG, Patricia and John individually and on behalf of their minor child, GARY ARMSTRONG and NORMA H., individually and on behalf of her minor child, RICHARD H., on behalf of themselves and all those similarly situated,

v.

KLINE, Caryl, Secretary of Education of the Commonwealth of Pennsylvania, individually and in her official capacity,

THE SCHOOL DISTRICT OF PHILADELPHIA, MICHAEL MARCASE, individually and in his official capacity as Superintendent of the School District of Philadelphia and

ARTHUR W. THOMAS, MRS. EDWARD OBERHOLTZER, AUGUSTUS BAXTER, MRS. LAWRENCE BOONIN, ROBERT SEBASTIAN, MRS. MICHAEL STACK, GEORGE PHILIP STAHL, JR., and DR. NICHOLAS TROLIO, individually and in their official capacities as members of the Board of Education of the School District of Philadelphia

(D.C. Civil No. 78-0172)

Marple Newtown School District, a defendant in D.C. Civil No. 78-0133,
Appellant in No. 79-2158

Caryl Kline, a defendant in D.C. Civil Nos. 78-0132, 78-0133 and 78-0172,
Appellant in No. 79-2188

Abington School District, a defendant in D.C. Civil No. 78-0132,
Appellant in No. 79-2189

School District of Philadelphia, Michael Marcase, Arthur W. Thomas, Mrs. Edward Oberholtzer, Augustus Baxter, Mrs. Lawrence Boonin, Robert Sebastian, Mrs. Michael Stack, George Philip Stahl, Jr., and Dr. Nicholas Trolio, defendants in D.C. Civil No. 78-0172,
Appellants in No. 79-2190

Robert Scanlon, a defendant in D.C. Civil Nos. 78-0132, 78-0133, 78-0172
Appellant in Nos. 79-2568, 79-2569 and 79-2570

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil Action Nos. 78-0132, 78-0133, 78-0172

Argued January 14, 1980
Before: Hunter, VanDusen and Sloviter,
Circuit Judges
(Opinion Filed July 15, 1980)

Allen C. Warshaw (Argued)
Edward G. Biester, Jr.
Norman J. Watkins
John Alzamora
Attorneys for Appellants in 79-2188,
79-2568/69/70

Janet F. Stotland (Argued)
Attorney for Appellees,
Armstrong, et al.
Sylvia Meek (Argued)
Attorney for Appellees,
Battle and Bernard

Michael I. Levin (Argued)
William Fearen
Cleckner & Fearer

Amicus Curiae for Pennsylvania
School Boards Association
Gwendolyn H. Gregory (Argued)
Thomas A. Shannon
August W. Steinhilber
Richard S. Cohen
Waldemar G. Buschmann

Amicus Curiae for State of Maine and
National School Boards Association

Frank D. Allen (Argued)
Joan Z. Bernstein
Ann Marie Reilly
Drew S. Days, III
Peter F. Vaira
Brian K. Landsberg

Amicus Curiae for United States
America

Roger A. Akin

Amici Curiae for the State of
Delaware and Board of Education
State of Delaware

Robert T. Lear
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Eleanore O'N. Kolodner
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Hippel
Attorneys for Abington School
District

Vram Nedurian
Attorney for Marple Newtown
School District

Lewis B. Beatty
Butler, Beatty, Greer & Johnson

OPINION OF THE COURT

Hunter, *Circuit Judge.*

1. The Education for All Handicapped Children Act, 20 U.S.C. §§1401-1420 (1976), requires that every state which elects to receive federal assistance under the Act provide all handicapped children with the right to a "free appropriate public education," *id.* §1412, and establishes detailed procedures for implementing that right. *Id.* §1415. The Commonwealth of Pennsylvania, a recipient of aid under the Act, has established an administrative policy, which sets a limit of 180 days of instruction per year for all children, handicapped or not. We are called upon, in this case of first impression, to examine the scope and purpose of this recent act and to decide whether Pennsylvania's policy and the statute may coexist. We conclude that they may not.

I.

2. This case is before us on interlocutory appeal from the grant of declaratory and injunctive relief ordered pursuant to a finding by the district court that the 180 day rule deprives the members of the plaintiff class of a free appropriate public education and violates their right to procedural safeguards under the Act. We have jurisdiction under 28 U.S.C. §1292(a) (1) (1976).

3. The case began as three class actions which were filed in January of 1978 by five handicapped children and their parents. The actions were consolidated for trial on their common injunctive and declaratory issues and the class of "[a]ll handicapped school aged persons in the Commonwealth of Pennsylvania who require or who may require a program of special education and related services in excess of 180 days per year and the parents or guardians

of such persons" was certified. *Armstrong v. Kline*, 476 F. Supp. 583, 586 (E.D. Pa. 1979).[1]

[1] Judge Van Dusen would hold this definition of the plaintiff class to be incomplete and would redefine the class as

> those school aged individuals who are severely emotionally disturbed or severely and profoundly impaired and whose regression-recoupment syndrome is so severe that the traditional summer vacation period occasioned by the 180 day policy brings their overall progress for the year to a virtual standstill

Concurring op. at 2. Judge Van Dusen is correct in noting that the original definition of the class in terms of those who "require" more than 180 days of education, is somewhat incomplete on its face. However, we believe that the content of the class is made clear in the court's opinion and in its orders which apply to those handicapped children whose regression-recoupment syndrome makes it "impossible or unlikely that they will attain that state of self-sufficiency that they could otherwise reasonably be expected to reach" if limited to 180 days of programming. Armstrong v. Kline, 476 F. Supp. 583, 597 (E.D. Pa. 1979). *See* Armstrong v. Kline, No. 78-172 (E.D. Pa. Sept. 5, 1979) (Remedial order No. 2).

The definition of the class is a matter within the broad discretion of the district court. *See* Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209, 212 (3d Cir. 1977), *aff'd*, 437 U.S. 478 (1978); *cf.* Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir.) (district court has broad discretion in determining if class action is maintainable), *cert. denied*, 419 U.S. 885 (1974); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969) (trial judge given greatest respect and broadest discretion in class action decisions). Where, as in the appeal currently before this court, the class action seeks only injunctive or declaratory relief, for which the notice provision of Fed. R. Civ. P. 23(c)(2) is not mandatory, the district court has even greater freedom in both the timing and specificity of its class definition. *See* Jiminez v. Weinberger, 523 F.2d 689, 697-98 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Rice v. City of Philadelphia, 66 F.R.D. 17, 19-20 (E.D. Pa. 1974); 3B

4. The plaintiffs sued numerous defendants, including the Commonwealth of Pennsylvania, the Pennsylvania Department of Education, the state Secretary of Education, the local school district in which each named plaintiff resides, and the superintendent of each district. The complaint alleged that policies of the defendants, specifically the Commonwealth's 180 day rule, the school districts' refusal to fund the provision of more than 180 days of educational programming, and the statutory provisions which set an annual ceiling on per student expenditures, Pa. Stat. Ann. tit. 24, §§13-1376, 13-1377 (Purdon Supp. 1979-80), violate the Education for All Handicapped Children Act, 20 U.S.C. §§1401-1420 (1976), the Rehabilitation Act of 1973, 29 U.S.C. §794 (1976 & Supp. II 1978), the due process and equal protection clauses of the Constitution, and various state laws. At this stage of the proceeding, however the district court has only passed upon the validity of the 180 day rule under the Education

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Moore's Federal Practice §23.04[1], at 120 (2d ed. 1980). The fact that the district court's class definition was not clarified until the time of judgment, *see, e.g.*, Remedial order No. 2, *supra*, does not require us to modify that definition. *See* Johnson v. General Motors Corp., 598 F.2d 432, 434-35 (5th Cir. 1979) (description of class by implication from final decree is sufficient); Jiminez v. Weinberger, 523 F.2d 689, 698-99 (7th Cir. 1975) (class defined concurrent with judgment), *cert. denied*, 427 U.S. 912 (1976).

Moreover, we note that on appeal neither party challenged the district court's class definition in either briefs or argument. Accordingly, in this case, the question of class definition is not properly before us. *See* Brown v. Sielaff, 474 F.2d 826, 828 (3d Cir. 1973). *Accord* Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 692 (4th Cir. 1978); United States v. Edmonds, 524 F.2d 62, 64 n. 11 (D.C. Cir. 1975). This is particularly so, since the class definition is not, in any respect, relevant to the theory with which we decide this case.

for All Handicapped Children Act. We shall, therefore address only that question, leaving the other issues to the district court in the first instance.

5. The Education for All Handicapped Children Act, 20 U.S.C. §§1401-1420 (1976), represents an attempt by Congress to assist the states in meeting the burdens imposed upon them by the widespread judicial recognition[2] of the right of handicapped children to a free public education appropriate to their needs. S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1429-33. The Act establishes a program of cooperative federalism which sets requirements which must be complied with in order for states to be eligible to receive financial assistance. A number of these requirements are relevant to the instant case. First, each state seeking assistance must have "in effect a policy that assures all handicapped children the right to a free appropriate public education," 20 U.S.C. §1412(1) (1976), and must develop a plan which details the policies and procedures which insure the provision of that right. *Id.* §1412(2). Each state must also establish the requisite procedural safeguards, *id.* §1412(5), and must insure that local educational agencies in the state will establish the individualized educational programs required by the Act,

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[2] The legislative history specifically cites the two seminal cases of Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (1972), and Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972), which suggest the existence of a constitutional right to free publicly supported education, S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1430. *See generally* Note, *The Education of All Handicapped Children Act of 1975*, 10 U. Mich. J.L. Ref. 110, 111-18 (1976).

id. §1412(4). Compliance is enforced by the requirement that the state plan must be submitted to and approved by the Commissioner of Education before the state is entitled to assistance. *Id.* §1413.

6. At the center of the controversy in this case is the definition of "free appropriate public education." According to the Act, "free appropriate public education" means

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id. §1401(18). "Special education" is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." *Id.* at §1401(16). "Related services" are those services which "may be required to assist a handicapped child to benefit from special education. . . ." *Id.* §1401(17). These include transportation and developmental, corrective, and supportive services such as speech pathology, audiology, recreation, psychological services, certain medical services,[3] physical therapy, occupational therapy, and counseling services, *Id.*

[3] "Related services" includes only those medical services necessary for diagnosis and evaluation. *Id.*

7. The individualized educational program (IEP) provides the vehicle for giving content to the required "free appropriate public education." The IEP is a

> written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Id. §1401 (19). The IEP must be reviewed and revised by the local educational agency at least annually. *Id.* §1414 (a) (5).

8. In order to assure that the IEP is properly formulated to provide a free appropriate public education, the Act prescribes several procedural safeguards. Whenever the local agency proposes to change or refuses to change the identification or evaluation of a chlid, or the provision of a free appropriate public education to a child, the

child's parents or guardian must be notified, and the parents or guardian must be given the opportunity to present complaints about any such matter. *Id.* §1415(b)(1). When a complaint is made, the parents or guardian are entitled to an impartial due process hearing, conducted by a hearing examiner unrelated to the local agency involved in the care of the child, or by the state educational agency. *Id.* §1415(b)(2). If the hearing is conducted by a hearing examiner, any aggrieved party may appeal to the state educational agency. *Id.* §1415(c).[4] Any party aggrieved by the decision of the state agency has a right to appeal to a state court of competent jurisdiction or to a district court of the United States. *Id.* §1415(e)-(2).

III.

9. The facts found by the district court are not disputed on appeal. Since District Judge Newcomer's opinion, reported below as *Armstrong v. Kline,* 476 F. Supp. 583 (E.D. Pa. 1979), sets forth these facts in detail, we shall content ourselves with a review of only those necessary to our decision.

A. Education of the Handicapped in Pennsylvania.

10. The Pennsylvania Department of Education (DOE) is the agency charged with the responsibility of providing education to handicapped children in compliance with the Act. Pursuant to the Act, the DOE requires local school districts to prepare an annual individualized education program (IEP) for each handicapped child.

[4] The hearings are to be conducted in accordance with numerous procedural safeguards, including the right to be advised by counsel, confrontation, cross-examination, compulsory process, the right to a verbatim record of the proceedings, and the right to the findings of fact and conclusions of law. *Id.* §1415(d).

The program is developed subsequent to an evaluation by educators and medical personnel by a multidisciplinary team familiar with the child. The IEP evaluates the child's current level of ability, establishes the child's program and placement, and sets long and short term educational goals. After it is formulated, the parents or guardian of the child are permitted to review and comment on the IEP. Although they comply with these procedures, the districts that are defendants in this action refuse to provide or fund more than 180 days per year of education for any child. *Id.* at 586-87.

11. If the parents are unsatisfied with any aspect of their child's classification, placement or program, as established in the IEP, they are entitled to an appeal to an impartial hearing examiner. The hearing examiner is appointed by the DOE and may not be an employee of the district or intermediate unit[5] from which the case originates. It is, however, the policy and practice of the DOE to refuse to provide or to fund the provision of education in excess of 180 days per year for any child, handicapped or nonhandicapped.[6] In keeping with this policy,

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[5] An intermediate unit is a

> public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

20 U.S.C. §1401(22) (1976).

[6] The derivation of this policy is unclear to this court. Although our attention has been called to Pa. Stat. Ann. tit. 24, §15-1501 (Purdon 1962), that statute establishes 180 as the minimum number of days per year which are permitted, not the maximum.

the DOE has instructed hearing examiners that they are "without authority to, and may not, order a special education program which is in excess of 180 days per year." *Id.* at 587.

B. The Plaintiff Class

12. Although the plaintiff has been broadly defined, the district court classified the handicapped children involved into two general groups: the severely and profoundly impaired by mental retardation alone or, as is frequently the case, combined with other impediments; and the severely emotionally disturbed. These conditions vary greatly from child to child and generalization is difficult and may suggest seductively simple solutions. However, it is necessary briefly to attempt to describe the salient characteristics of these children.

13. The Severely and Profoundly Impaired (SPI) are generally regarded as children whose I.Q. is below 30. The severely retarded

> are likely to be physically handicapped and have difficulty moving. They may enter the school system without toilet training and lack many basic self-help skills, such as dressing and feeding. Their language deficit is usually significant. Academically, one expects their achievements to be very limited, although they may be able to count, tell time and identify a few words on sight at the completion of their education.

Id. at 588. The profoundly retarded are the next and lowest subgroup. A profoundly retarded child is unlikely to posses any vocabulary or to be ambulatory. Communication is typically limited to gesturing. *Id.* SPI children tend to learn much more slowly than nonhandicapped

children and tend much more quickly to forget what they have learned. Additionally, SPI children tend to have great difficulty generalizing skills they have learned from one environment to another. *Id.*

14. Severely Emotionally Disturbed (SED) children suffer from a wide variety of disturbances including autism, characterized by an inability to relate to and communicate with others, symbiosis, marked by an inseparable relationship with one other person, and schizophrenia which is characterized by strange relationships with other individuals and an inability to cope with reality.[7] *Id.* at 589-90. SED children frequently exhibit bizarre behavior and are typically unable to accept changes of routine or environment or to deal with frustration. *Id.*

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[7] Federal Regulations define "seriously emotionally disturbed" as follows:

> (i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:
>
> (A) An inability to learn which cannot be explained by intellecutal, sensory, or health factors;
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
>
> (C) Inappropriate types of behavior or feelings under normal circumstances;
>
> (D) A general pervasive mood of unhappiness or depression; or
>
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
>
> (ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

45 C.F.R. §121a.5 (1979).

These characteristics, combined with the inability of SED children to exercise self-control, frequently affect their learning capabilities in much the same way as the abilities of SPI children are affected. Thus, they have difficulty learning new skills and have difficulty generalizing skills. SED children also frequently enter the educational system lacking in many basic self help skills. *Id.*

15. The educational programs of SPI and SED children depend on the individual abilities of each child. Where basic self help and social skills such as toilet training, dressing, feeding, and communication are lacking, formal education begins at that point. If the child masters these fundamentals, the education moves on to more difficult but still very basic language, social, and arithmetic skills, such as counting, making change, and identifying simple words. In addition, SED children typically require professional assistance in handling their emotional disturbances. *Id.* at 591.

16. The modest objectives of the educational programs of SPI and SED children are related to each child's potential and typically include "acquiring additional self help skills, avoiding institutionalization or attaining that level of independence with regard to self care that he or she can live in a community living arrangement or at home and work in a sheltered workshop." *Id.* at 590. For some, but not all, SPI and SED children, standing in the way of the attainment of some of these objectives is the effect of breaks in the educational program which are created, at least in part, by the 180 day rule. The district court found that "as a result of programming interruptions some SPI children lose a large amount of skills and development. . . ." *Id.* at 593. A similar regression of skill development is found among SED children who

also experience a decline in emotional development. Although this regression also occurs in nonhandicapped children, the effect is significantly greater among many SPI and SED children. *Id.* at 595. The district court rejected the defendants' claims that factors other than programming breaks, including teacher incompetency, parental failure and the lack of functionality of the skills taught, were the cause of regression, finding instead that all factors contribute.

17. Most importantly, the time required to recoup these lost skills, although it varies significantly from child to child, is usually much greater than the time required by the nonhandicapped.

> Some SPI and SED children return to their pre-break level in a period as short as two weeks, even when they have lost a significant amount of their skills, and then there are other children for whom the process will be long and arduous, consuming sometimes in excess of nine months. Other SPI and SED children will take a month to two months to return to their former level.

Id. at 597. Normal children, on the other hand, typically recoup losses within a few weeks and almost never require more than one month. The district court concluded that "interruptions in programming, because of regression and the length of time it takes to regain lost skills and behaviors, render it impossible or unlikely that they will attain that state of self-sufficiency that they could otherwise reasonably be expected to reach." *Id.*[8]

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[8] The court stated that its "ultimate factual finding" was that the 180 day rule "precludes plaintiffs and those similarly situated from receiving an education that is likely to allow them to reach

C. The District Court's Resolution of the Problem.

18. The district court, faced with the difficult question of the validity of the 180 day rule, perceived the issue as defining the parameters of a "free appropriate public education." This analysis began with the definition of special education, one of the ingredients of a free appropriate public education. *Id.* at 603. The court specifically examined the requirement that special education be designed "to meet the unique needs" of the handicapped child. The court, however, recognized that "[n]eeds arise in [the] context of achieving certain ends, and surely there are certain ends, and not others, that are the concern of this legislation." *Id.* From this perceptive conclusion, the court sought to discern the educational goals intended by the statute to be attained by the plaintiff class. Finding no guidance in the Act itself, the court turned to the legislative history. There, the district court found language to support its conclusion that "[t]he congressional intent was to provide for that education which would leave these children, upon school's completion, as independent as possible from dependency on others, including the state, within the limits of the handicapping condition." *Id.* at 604. Based on this legal conclusion,

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their reasonably set educational goals with respect to self-sufficiency, whether that be merely avoiding institutionalization or living in a community living arrangement and working in a sheltered workshop." *Id.* at 600. We believe these two findings to be the same in light of the court's conclusion that the "reasonably set educational goal" is, in fact, set by the Act, which requires the educational program to "leave these children, upon school's completion, as independent as possible from dependency on others, including the state, within the limits of the handicapping condition." *Id.* at 604.

and its finding that the 180 day rule precluded these children from attaining that degree of self-sufficiency which they could otherwise (i.e., without the 180 day rule) reach, the district court invalidated the 180 day rule.

IV.

19. The core of this case is the conflict between the 180 day rule and the statutory mandate of "free appropriate public education." The district court concluded that the Act provides a specific educational goal for members of the plaintiff class. We believe that by focusing on the Act as providing a particular educational goal, the district court erred. Rather, the Act contemplates that in the first instance each state shall have the responsibility of setting individual educational goals and reasonable means to attain those goals. The Act, however, imposes strict procedural requirements to insure the proper formulation of a free appropriate public education. We conclude that the 180 day rule precludes the proper determination of the content of a free appropriate public education and, accordingly, that it violates the Act.

20. To reach this conclusion, we must necessarily interpret the Act's requirement of a free appropriate public education. Unfortunately, the Act provides only limited guidance. First, free appropriate public education must meet the standards of the state educational agency. 20 U.S.C. §1401 (18) (B) (1976). Second, it must be provided in conformity with an individualized education program. *Id.* §1401 (18) (D). Finally, the Act requires that special education, which is a component of "free appropriate public education," meet the unique needs of the handicapped child. *Id.* §1401 (16). We find nothing in the Act or regulations promulgated there under which

further amplifies these provisions so as to provide a clear solution to the conflict in this case. *See generally Rowley v. Board of Educ.*, No. 79-2139, slip op. at 11-12 (S.D. N.Y. Jan. 17, 1980).

21. The requirement that a free appropriate public education meet the unique needs of the child raises the most difficult question. As the district court properly recognized, needs are necessarily determined in reference to goals. 476 F. Supp. at 603. The only reason a child needs certain programming is to accomplish certain educational objectives. If those objectives are removed, these needs cease to exist.[9] We must, therefore, decide how the Act contemplates that appropriate educational goals are to be determined.

22. The first possibility, of course, is that the Act itself mandates specific educational goals. Here, again,

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[9] Moreover, in the absence of educational objectives, we do not believe that the fact that class members experience regression during periods without programming and require unusually long periods of time to recover those lost skills creates "unique needs". We can perceive no difference between a child who requires two months to recoup prior learning then acquires a quantum of new skills in the remainder of the school year, and a child who loses little during a break, but is a slower learner, requiring the entire school year to learn the same quantum. Indeed, the findings of the district court indicate that the regression problem of SPI and SED children appears to be but a larger scale version of a phenomenon found in normal children. The significance of the regression problem is little different from the significance of the fact that SPI and SED children learn skills much more slowly than nonhandicapped children. Regression and speed of learning are significant only insofar as they impact on the child's ability to attain specified educational goals. In the absence of such goals, however, they are not relevant.

however, we find little assistance. In requiring that education programs for handicapped children meet the child's unique needs, the Act appears to focus on those needs which derive from the difference between the handicapped child and a normal child. Thus, the Act probably anticipates that, where possible, educational objectives for the handicapped should be set with reference to those objectives established for the nonhandicapped. *See Rowley v. Board of Educ.*, slip op. at 10-11; Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103, 1125-27 (1979) (hereinafter cited as Harvard Note); *cf.* 45 C.F.R. §84.33(b) (1979) (defining "appropriate education" under the Rehabilitation Act of 1976, 29 U.S.C. §794 (1976 & Supp. II 1978).[10] So, for example, a blind or deaf child may be expected to attain educational achievements commensurate with normal children upon the provision of special services, such as braille books or a sign language interpreter. *See generally Rowley v. Board of Educ.*, No. 79-2139 (S.D.N.Y. Jan. 17, 1980).

23. However, even where educational objectives may be established with reference to those objectives set for the nonhandicapped, the determination of appropriate educational programming required by the statute raises extremely difficult problems both in selecting the standard for comparison and in making the appropriate com-

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[10] 45 C.F.R. §84.33(b) provides in relevant part:

> For the purpose of this subpart, the provisions of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.
>
> . . .

parison. *See, e.g., Rowley v. Board of Educ.*, slip op. at 11-17; Harvard Note, *supra*, at 1125-27. Where, as in this case, the handicap in question profoundly affects the child's learning ability, this comparison reaches a level of difficulty, which, in the absence of legislative guidance, approaches the perimeter of judicial competence. *See generally* Note, *The Education of All Handicapped Children Act of 1975*, 10 U. Mich. J.L. Ref. 110, 130-35 (1976) (hereinafter cited as Michigan Note). As the Supreme Court stated in *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973),

> [T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.'

Id. at 42 (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)). *See McInnis v. Shapiro*, 293 F. Supp. 327, 335-36 (N.D. Ill. 1968).

24. We believe, however, that in cases such as this, the Act did not contemplate a judiciary left to flounder in uncertain educational waters. Traditionally, decisions of educational policy and control over the educational system have been vested in state and local authorities. *See Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 42-43, 49-50 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); Harvard Note, *supra*, at 1109. As the Supreme Court said

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local antonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process. Thus in San Antonio School District v. Rodriguez, we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation and a healthy competition for educational excellence.'

Milliken v. Bradley, 418 U.S. at 741-42.

25. Moreover, the decision to establish certain educational objectives for handicapped children profoundly impacts on the allocation of scarce educational resources. It is beyond dispute that although an educational system ideally should provide the opportunity for its students to develop to their fullest potential, even the best systems are incapable of achieving this goal. *See Rowley v. Board of Educ.*, slip op. at 11; Harvard Note, *supra*, at 1125. In passing the Act, Congress certainly recognized the importance of this problem. The Senate Report quotes with approval *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972), which states that:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Co-

> lumbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child.

We believe that these hard decisions of resource allocation, like the determinations of educational policy are best left to the states, in the first instance. *Cf. Dandridge v. Williams,* 397 U.S. 471, 487 (1970) (Constitution does not empower second guessing on resource allocation). *See generally* Michigan Note, *supra,* at 125-28.

26. These policies have been incorporated into the Act. It is most apparent in the requirement that a free appropriate public education meet the standards of the state educational agency. 20 U.S.C. §1401(18)(B) (1976). Moreover, the Act clearly places ultimate responsibility for compliance with the Act upon the state educational agency. *Id.* §1412(b). Perhaps more important is the structure of substantive educational decision-making established by the Act. The core of educational programming under the Act is the individualized educational program. *See Id.* §1414(a)(5). Although the procedure established for formulation of these IEPs requires parental input, there is little doubt that the final decision rests with the local educational agency, a subdivision of the state. This fact is reflected in both the Pennsylvania procedures, which appear to limit parental input to post hoc commentary, and in the statutory appeal procedure which grants a right only to the parents to complain about the IEP, in contrast with the right to appeal decisions of the hearing examiner, which is granted to both the state and to the parents. *Compare id.* §1415(b) *with id.* §1415(c). We conclude, therefore that the Act

contemplates that the determination of appropriate educational goals, as well as the method of best achieving those goals, are matters which are to be established in the first instance by the states.

27. The district court, relying on the legislative history of the Act, determined that Congress viewed the attainment of self-sufficiency as a goal of the Act. From this, the district court concluded that the Act imposed specific substantive educational requirements on the states. Although the district court was correct in noting a congressional concern with increased self-sufficiency, we find nothing in the legislative history to overcome our conclusion that the states are free, in the first instance, to establish specific educational goals.

28. The concern for increased self-sufficiency is reflected in the Senate report to the Act, which states:

> With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

S. Rep. No. 168, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1433 (hereinafter cited as Senate Report). These concerns also appear in the congressional debates about the bill. *See, e.g.*, 121 Cong. Rec. 19492 (1975) (Senate debate); *id.* at 25541 (1975) (House debate). These statements however, do not purport to define the content of "appropriate education" or to articulate specific educational goals.

29. In addition, Congress recognized the need for equal educational opportunity for the handicapped. The

statutory statement of purpose states "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the needs of handicapped children in order to assure equal protection of the law." Pub. L. No. 91-230, §601, Stat. (1970), *as amended by* Pub. L. No. 94-142, §3(a), Stat. (1975). The Senate Report states "[i]t is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." Senate Report, *supra,* [1975] U.S. Code Cong. & Ad. News at 1433.

30. Certainly all of this language, including that which expresses a concern for increased self-sufficiency, should provide guidance in the formulation of educational goals.[11] We believe, however, that the district court was

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[11] While recognizing that the legislative history of the Act reflects an underlying congressional concern with increased self-sufficiency which should guide the states in their formulation of specific educational goals, we refrain from declaring that concern to be "the ultimate goal" of the Act. *See* Judge Sloviter's concurring and dissenting op. at 34. We think it would be unwise to declare in advance that all educational policies predicated on other reasonably conceived goals are invalid. Each such policy deserves the benefit of a full examination for compliance with the Act by this court, especially in light of a legislative history which we do not believe clearly defines any single ultimate goal. Indeed, Pennsylvania's educational policy was in fact directed at the goal of increased self-sufficiency, so that this case does not even present us with the opportunity to review a policy based upon some other underlying goal.

Moreover, we note in passing that even if we were to view increased self-sufficiency as the ultimate goal of the Act, we would still disagree with Judge Sloviter's conclusion that the district

premature in attempting to formulate educational policy from the legislative history in the face of the Act's deference to state educational decisionmaking.

31. Having concluded that the states are responsible in the first instance for setting reasonable educational objectives and reasonable means to achieve those objectives, it falls upon us to determine if the Act restricts the states in these determinations. We believe that it does. First, the Act provides for pervasive federal oversight by the Commissioner of Education. Second, the Act sets forth explicitly detailed procedures to assure that the states will properly exercise their responsibility to provide "free appropriate public education." We now consider whether by imposing the 180 day rule the Commonwealth of Pennsylvania comes into conflict with these provisions of the Act.

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court's orders should be affirmed in their entirety. The district court, by concluding that the Act required the states to "provide for that education which would leave these children . . . as independent as possible from dependency on others . . . within the limits of the handicapping condition," *Armstrong v. Kline*, 476 F. Supp. 583, 604 (E.D. Pa. 1979), effectively established a specific *level of achievement* for each individual, i.e., maximization of self-sufficiency. This position goes far beyond "establishing the *direction* toward which the programs required by the statute should aim." Judge Sloviter's concurring and dissenting op. at 39 (emphasis added), and clearly intrudes upon the very core of those issues which are to be left to the states in the first instance, *see supra* at 20-22. Indeed, Judge Sloviter indicates that she would limit the Act's requirement of the achievement of self-sufficiency to that which is possible "within the reasonable limits of resource allocation." Judge Sloviter's concurring and dissenting op. at 38. This, in itself, would seem incompatible with the district court's finding that the statute requires the maximization of self-sufficiency for each child.

V.

32. At the core of the Act is a detailed procedure for determining the contours of the free appropriate public education to be delivered to each child. 20 U.S.C. §1415 (1976); *see Lora v. Board of Educ.*, 456 F. Supp. 1211, 1227 (E.D.N.Y. 1978). *See generally* Harvard Note, *supra,* at 1108-13; Michigan Note, *supra,* at 137-51. We believe that these procedural safeguards require individual attention to the needs of each handicapped child. *See Lora v. Board of Educ.*, 456 F. Supp. at 1226 (clear national commitment to meet each child's special needs in a complete and integrated way); Michigan Note, *supra,* at 123. The strongest statement of this requirement is the statutory mandate of individualized educational programs. The IEP is the statutory vehicle for formulating the educational objectives and the educational program for each child. We consider it most persuasive that at this fundamental point in the educational decision making process, the statute requires consideration of each individual child. Nor do the later procedures required by the Act depart from this emphasis. The appeal prescribed by the Act is an appeal from the decisions reflected in IEP. *See* 20 U.S.C. §1415 (b) (2) (1976). Moreover, as difficult as it is to define the scope of the "unique needs" which must be met by special education, *see id.* §1401 (16), there can be little doubt that by requiring attention to "unique needs", the Act demands that special education be tailored to the individual.

33. This emphasis on the individual is necessary in light of the wide variety of the handicapping conditions covered by the Act. The Act explicitly includes the following children within the meaning of "handicapped children":

> mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

Id. §1401 (1).[12] Indeed, even within the limited conditions which characterize the plaintiff class there is a wide divergence of educational characteristics. This divergence is reflected in the findings of the district court which note the variance among members of the plaintiff class in their degree of impairment, 476 F. Supp. at 588-90, their recovery time from regression, *id.* at 596-97, and the ability of their parents to provide programming, *id.* at 594-95.

34. We believe the inflexibility of the defendants' policy of refusing to provide more than 180 days of education to be incompatible with the Act's emphasis on the individual. Rather than ascertaining the reasonable educational needs of each child in light of reasonable educational goals, and establishing a reasonable program to attain those goals, the 180 day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives. This, the Act will not permit.

35. To be sure, the Act contemplates that reasonable educational standards may be set by the states. *See* 20 U.S.C. §1401 (18) (B) (1976) (definition of "free appropriate public education"); *id.* §1412 (2) (B) (development of state plan detailing policies and procedures). We believe, however, that these standards must allow for individual consideration of each handicapped child.

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[12] For an elaboration of these conditions, see 45 C.F.R. §121a.5 (1979).

36. Moreover, in promulgating these standards, the Act contemplates review and approval by the Commissioner of Education, *id.* §1413(c), as well as procedural safeguards including public notice and comment, *id.* §1412(7)(B). In this way the Act assures that any state standard will be filtered through both the state educational agency, with its expertise and sensitivity to both educational and fiscal matters, the Commissioner of Education, with his expertise, and the general public. Where an inflexible rule has not been afforded this consideration it certainly must fall.[13]

37. We recognize that by this decision we may merely be postponing the inevitable. The statute provides for federal and state judicial review of individual educational programs which have been appealed through the statutory procedure. *Id.* §1415(e)(2). Thus it is quite possible that, in the future, we will be called upon to evaluate the substantive content of educational programs

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[13] The Commonwealth contends that the Commissioner of Education approved the Pennsylvania plan despite inclusion of the 180 day rule. An affidavit submitted to this court by the Commonwealth, however, belies that contention. The approved plan contains only the statements that funds "will be utilized to support instructional programs during the period required by state law." The Commonwealth contends that this, combined with the statutory *minimum* of 180 days, Pa. Stat. Ann. tit. 24 §15-1501 (Purdon 1962), constitutes inclusion of the 180 day maximum in the plan. We disagree. The plan gives no indication that the Commonwealth will refuse to fund programs in excess of the period required by state law. Moreover, the "period required by state law" is an ambiguous term which does not necessarily refer to the 180 day provision. Finally, we note in passing that the Commissioner disagrees with this interpretation of the Pennsylvania plan and, appearing as Amicus, argues strenuously against the 180 day rule.

developed under the Act. We are hopeful, however, that prior to that day the states in cooperation with the Commissioner of Education will establish acceptable guidelines to aid in that most difficult decision. Until we are presented with that case, however, "this [c]ourt's lack of specialized knowledge and experience counsels against premature interference" with educational policy decisions.

38. We therefore conclude that inflexible application of a 180 day maximum prevents the proper formulation of appropriate educational goals for individual members of the plaintiff class. Because our reasoning differs from that of the district court, some of its orders may require modification. However, because of the multiplicity of factors involved, we believe these modifications are best undertaken by the district court on motion of the parties. In the interim, these orders will remain in force. The case will be remanded to the district court for further proceedings consistent with this opinion.

Van Dusen, *Circuit Judge*, concurring.

I agree with Judge Hunter's opinion that under the Education For All Handicapped Children Act, 20 U.S.C. §§1401-1420 (1976), it is up to the states, not Congress, to establish educational goals for handicapped children. I agree also that the inflexible application of a 180-day maximum in every instance, regardless of the needs of the child or the resources available, violates the Act by preventing the proper formulation of appropriate educational goals for individual members of the plaintiff class. I write separately, however, to emphasize what I perceive to be the limited nature of our holding in this case. I believe that the class before us is narrow in scope, and that the Act, while placing numerous requirements on recipients of federal funds, makes accommodation for legitimate financial concerns of the states.

The district court stated that the plaintiff class consisted of "[a]ll handicapped school age persons in the Commonwealth of Pennsylvania who require or may require a program of special education and related services in excess of 180 days per year. . . ." *Armstrong v. Kline*, 476 F. Supp. 583, 586 (E.D. Pa. 1979). Standing alone, this definition is incomplete. It essentially states that those who are entitled to relief are those who require relief. It does not describe the nature of the handicaps of individuals who "require" programs in excess of 180 days per year.[1] The district court did amplify this defini-

[1] In its opinion the district court at several points referred to SED and SPI children whose regression-recoupment problem made it "impossible or unlikely that they will attain that state of self-sufficiency that they could otherwise reasonably be expected

tion somewhat, however. The court described at length the characteristics of the five named plaintiffs who had been denied education in excess of 180 days per year, and concluded that they, as well as the other children in the class, fall into two categories: severely and profoundly impaired by mental retardation with other handicaps (SPI); and severely emotionally disturbed (SED). *Id.* at 588. The court reviewed the evidence concerning the effects of interruptions in educational programming on children in these categories, and found that some SPI and SED children, including the named plaintiffs, suffer significant setbacks when there are breaks in their educational programming. *Id.* at 597. Upon examination of the findings of the trial court with respect to the serious regression in skills experienced by the named plaintiffs and the difficulty with which they recoup those skills after programming interruptions, *id.* at 593-96, I think it is fair to refine the description of the class as follows: those school age individuals who are severely emotionally disturbed or severely and profoundly impaired and whose regression-recoupment syndrome is so severe that the traditional summer vacation period occasioned by the 180-day

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to reach." *Armstrong v. Kline*, 476 F. Supp. 583, 597 (E.D. Pa. 1979); *see id.* at 604. It appears to me that this description also is incomplete in defining the boundaries of the class. In this suit the district court reached a legal conclusion that the Act imposed a specific educational goal—that of maximizing self-sufficiency—for individuals who are handicapped within the meaning of the Act. In effect, the court in this description has identified class members in terms of the ultimate legal conclusion, rather than in terms of the factual attributes which place them in the class. The definition is silent as to the physical and mental characteristics which individuals must possess in order to be class members and entitled to the relief sought.

policy brings their overall progress for the year to a virtual standstill. I believe this characterization of the class is fair.[2] Counsel for plaintiffs describes the class similarly:

> "[T]he Court found that plaintiffs, because of the nature and severity of their handicapping conditions, require educational programs which are not only different from those provided to non-handicapped children, but different from those needed by most handicapped children.
>
> "[P]laintiffs' unique learning characteristics, together with the defendants' 180 day rule, result in a never ending cycle of progress, interruption in programming, and regression, causing at best severely limited educational progress, and at worse, permanent and irreversible harm."

Brief of Appellees Armstrong at 25. Thus, it is with regard to this group of handicapped children that the standard 180-day policy may not be applied. Based on the voluminous evidence presented in this case, the plaintiffs in effect have established a presumption that SED and SPI children with severe regression-recoupment problems require more than 180 days of programming per year.[3]

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[2] I disagree with the view that this is a redefinition of the class and raises an issue not properly before us. See majority opinion at 5, note 1. As the majority opinion acknowledges, the class definition articulated by the district judge is incomplete on its face. Thus, I believe, we are forced to describe the class more fully in order that the concerned parties will be able to know who is bound by our decision.

[3] The district court made factual findings, not contested on appeal, that some SPI and SED children do not lose a significant amount of previously acquired skills when their programs are interrupted, *Armstrong v. Kline,* 476 F. Supp. 583, 593 (E.D. Pa.

Further, in my view, our decision today prescribes an approach that recipients of funds from the Education For All Handicapped Children Act should take. Under the Act, the state educational authorities must treat handicapped children individually and must set specific educational goals. This translates, I believe, into a prohibition against the application of a rigid 180-day policy when devising individual plans. Thus, the state education specialists must first attempt to plan adequate programs to meet the needs of individual handicapped children without regard to an inflexible 180-day limit,[4] and then must attempt to fund the programs to the maximum extent

1979), and that some SPI and SED children "return to their pre-break level in a period as short as two weeks, even when they have lost a significant amount of their skills." *Id.* at 597. For these children the summer vacation period occasioned by the 180-day policy would not be detrimental. The district court recognized this, and emphasized that the evidence demonstrated that other SPI and SED children experience significant problems with both regression and recoupment. *Id.*

[4] For example, in preparing an individualized educational program (IEP) for a child who is severely emotionally disturbed and has been identified as one who experiences serious problems with regression and recoupment when his programming is interrupted, it would be presumed that the traditional summer vacation period occasioned by the standard 180-day policy of defendants would be very detrimental to his educational progress. Therefore, his IEP would most likely include programming at certain intervals throughout the summer months, in addition to that planned during the traditional school year. The defendants would be required to attempt to provide all the programming called for by the IEP. If financial restraints prevented defendants from furnishing all the programming outlined in the IEP, certain cutbacks in the IEP would be permissible (such as, for example, reductions from daily programming to programming twice a week during the summer).

feasible. If, thereafter, the state administrators are in some instances unable due to budgetary restraints to furnish the full programs they have devised for each individual, such program cutbacks imposed by legitimate funding limitations will not in themselves place the educational authorities in noncompliance with the statute.[5]

In summary, I believe we must take a pragmatic view of the problem presented to us by the Education For All Handicapped Children Act. We must enforce the provisions of the Act by invalidating here the defendants' inflexible application of a 180-day maximum policy, but we must also acknowledge that the defendants do not have unlimited resources. With these factors in mind, I concur in the remand and the judgment of the court.

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[5] We are aware that insufficient funding may affect programs for the nonhandicapped as well as for the handicapped; the brunt of it cannot be permitted to fall more heavily on the handicapped, however. *See Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972).

Sloviter, *Circuit Judge,* concurring and dissenting in part.

In enacting the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq. (1976), Congress has undertaken to provide federal assistance to the states in order that handicapped children, defined as those who are mentally retarded, learning disabled, physically handicapped, and emotionally disturbed, *id.* §1401(1), will be able to receive a free public education appropriate to their needs. The statute imposes the following three principal obligations on states which choose to participate: (1) It *requires* that each participating state must have "in effect a policy that assures all handicapped children the right to a free appropriate public education," *id.* §1412(1); (2) It requires that each state must establish fair procedures designed to effectuate the individualized attention to which each handicapped child is entitled. These include establishment of an individualized educational program (IEP) for each child, and notice and an opportunity to be heard with respect to that IEP and any changes regarding it, *id.* §§1401(19), 1412(4), 1414(a)(5), 1415-(a)-(d); and (3) It requires that each state must develop a plan which sets forth in detail the policies and procedures which the state will undertake to assure, *inter alia,* that there is established "a goal of providing full educational opportunity to all handicapped children." *Id.* §1412(2)(A).

Judge Newcomer made findings of fact, including those regarding the learning regression of members of the plaintiff class, which have not been disputed on appeal. After considering these facts, the language of the statute, and its history, he held that Pennsylvania's policy which

limits the instruction available to handicapped children to 180 days a year

> precludes plaintiffs and those similarly situated from receiving an education that is likely to allow them to reach their reasonably set educational goals with respect to self-sufficiency, whether that be merely avoiding institutionalization or living in a community living arrangement and working in a sheltered workshop.

Armstrong v. Kline, 476 F. Supp. 583, 600 (E.D. Pa. 1979).

The majority agrees that Pennsylvania's "inflexible application of a 180 day maximum prevents the proper formulation of appropriate educational goals for individual members of the plaintiff class." Typescript op. at 28. It appears to reach this conclusion on the basis that the Pennsylvania rule violates the procedural requirements which the Act imposes, because the rule applies across the board without regard to the individual child. I agree with the majority in this conclusion. However, the majority declines to affirm the district court judgment in its entirety because "the district court was premature in attempting to formulate educational policy from the legislative history in the face of the Act's deference to state educational decision making." Typescript op. at 24. I respectfully dissent from this portion of the majority's decision because I believe that elucidation of the principal goal of the statute is essential to any interpretation of its provisions, whether they are substantive or procedural.

The rationale given by the majority for declining to attempt some definition of the statutory goal of a "free appropriate public education" is twofold. It would defer

to the states in this regard because, first, "[t]raditionally, decisions of educational policy and control over the educational system have been vested in state and local authorities", typescript op. at 20; and, second, "hard decisions of resource allocation, like the determinations of educational policy are best left to the states, *in the first instance.*" Typescript op. at 21 (emphasis added).

These reasons confuse explication of the *ultimate goal,* which Congress articulated but unfortunately failed to define when it enacted the statute, and the appropriate implementation of that goal, which Congress left to determination by the states. I agree with both of my colleagues that the contours of the state's program must be defined by the state. It is the state which must determine which specific programs should be offered, how those programs must be structured, and how the delicate and intricate balancing of funds and resources between handicapped and nonhandicapped children must be managed. In the process, different states may establish somewhat varying mediate goals as steps toward realization of the federal policy.

On the other hand, the *ultimate goal* of the statute was already set by Congress when it legislated the specific goal of a "free appropriate public education" and required the states to adopt that policy. The states are not free to develop any different policy or modify that set by Congress. Therefore, there is no reason to defer to the states for a definition of the Congressionally established policy. The usual reasons for deference, familiarity with local conditions and local resources, warrant deference to the state in the manner in which the policy should be implemented but are inapposite when the issue is the

meaning of the statutory policy. Although the majority does not expressly so state, its deferral to state definition suggests that each state may define the statutory goal differently. But the statute manifests a considered judgment by Congress as to the needs of the handicapped children of the entire country. Those needs may not be adequately met if the local programs are measured against a statutory goal which is permitted to vary with the happenstance of the state in which the child lives. There is nothing in the statute which would warrant anything other than a uniformly applicable interpretation of the nationally prescribed goal of a "free appropriate education."

The majority's reluctance to consider the goal cannot even be supported as a labor-saving device for the federal judiciary. Although the result of its holding is to require that Pennsylvania analyze whether the 180 day rule violates the statutory right of each individual member in the plaintiff class to a "free appropriate education" without any guidance by this court as to what goal that language comprehends, our respite will be only temporary. For, the majority recognizes that, in the last analysis, there must be a federal interpretation of a federal statute. "We recognize that by this decision we may merely be postponing the inevitable. The statute provides *for federal* and state judicial review of individual educational programs which have been appealed through the statutory procedure. *Id.* §1415(e)(2). Thus it is quite possible that, in the future, we will be called upon to evaluate the substantive content of educational programs developed under the Act." Typescript op. at 29. (Emphasis added). Therefore, I believe that since the question is appropriately before us today, we cannot responsibly defer the decision for another day.

Turning then to the meaning of the statutory language, "a free appropriate education," the district judge found the reasonable education objective of the statute to be directed to the goal of achieving self-sufficiency. He concluded "that the unique needs that must be met by the educational program include those that if satisfied, allow the child, within the limits of his or her handicap, to become self-sufficient." 476 F. Supp. at 604.

This goal was one that was once acknowledged by the Commonwealth of Pennsylvania in the past, was espoused by the educational experts in this case, including experts representing the Commonwealth, and appears to be the generally accepted educational objective for severely retarded and emotionally disturbed children. Finally, and most importantly, this appears to be the ultimate goal contemplated by Congress when it enacted the statutory scheme.

In *Pennsylvania Association for Retarded Children [P.A.R.C.] v. Commonwealth of Pennsylvania,* 334 F. Supp. 1257 (E.D. Pa. 1971) (three-judge court) (per curiam), plaintiffs challenged Pennsylvania's policy which excluded mentally retarded children from education and training in public schools. They presented testimony from four experts in the field of education of retarded children to prove that the retarded are educable and that denial of such education amounts to a denial of equal protection of the laws. The Commonwealth, soon after presentation of plaintiffs' evidence, entered into a Consent Agreement in which it undertook to provide free public education for *all* children between the ages of six and twenty-one. In paragraph 4 of the Consent Agreement, the Commonwealth agreed to the objective of providing handicapped children with education aimed at fostering self-

sufficiency, the goal about which the Commonwealth now complains:

> 4. Expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care. . . .

P.A.R.C., 334 F. Supp. at 1259.

The Commonwealth's undertaking to educate the handicapped with the goal of fostering self-sufficiency is also reflected in the regulations of the Pennsylvania Department of Education which state that Pennsylvania's educational standards are aimed at "provid[ing] exceptional school-aged persons with quality special education programs and services which will ultimately enable them to participate as fully as possible in appropriate activities of daily living." 22 Pa. Code §13.2(a). *See also Fialkowski v. Shapp*, 405 F. Supp. 946, 959 (E.D. Pa. 1975) (possible equal protection violation exists if handicapped children do not receive an education equipping them with the "tools needed in life").

Significantly, the Commonwealth does not challenge on appeal here Judge Newcomer's finding that the goal of self-sufficiency for SPI and SED children is one generally recognized by educators. The court stated.

> Generally, educators of the SPI or SED speak of their students' potential in terms of attaining the highest level of self-sufficiency that the child can achieve, whether that be acquiring additional self help skills,

> avoiding institutionalization or attaining that level of independence with regard to self care that he or she can live in a community living arrangement or at home and work in a sheltered workshop. *Both plaintiffs' and defendants' experts agreed that these generally were the objectives of the education of the SPI and SED.*

476 F. Supp. at 590 (emphasis added).

The Supreme Court has recognized that education is designed to enable students to become self-sufficient. It has commented that "education prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin v. Yoder,* 406 U.S. 205, 221 (1972), and that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

There are several indications that Congress intended that the special education mandated by the statute should be directed to the achievement of self-sufficiency by the handicapped child to the extent possible within the reasonable limits of resource allocation. The *P.A.R.C.* Consent Decree which adopted that goal was expressly referred to throughout the legislative history of the statute. S. Rep. No. 94-168, 94th Cong. 1st Sess. 1, 6-7. The Senate Report accompanying the statute stated that the intent of Congress was to establish a program which "will result in maximum benefits to handicapped children and their families." Education for All Handicapped Children Act of 1975, S. Rep. No. 94-168, 94th Cong., 1st Sess. 1, 6 *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1430. The Report referred to the need to increase in-

dependence of the handicapped and to end their needless institutionalization. *Id.* at 7-9, 1975 U.S. Code Cong. & Ad. News at 1431-33.

Defendants claim that no child is entitled to a goal of maximization as part of his or her education. They argue that the statute requires merely assurance of an equal educational opportunity for the handicapped. The district court recognized that the state was not required to "provide a program which is designed to allow each handicapped child to reach his or her maximum potential in every respect." 476 F. Supp. at 604.

> Rather, it is limited to those areas with which Congress expressed concern. The congressional intent was to provide for that education which would leave these children, upon school's completion, as independent as possible from dependency on others, including the state, within the limits of the handicapping condition.

Id.

Provision of an equal number of school days or equal resources is obviously not enough to meet the design of the statute because provision of an equal education to handicapped children such as those in the plaintiff class would not satisfy their unique needs. Defendant's argument would read out of the statutory goal the requirement that the education for handicapped children be "appropriate". By use of that word, as well as by the entire statutory structure, it is manifest that Congress was concerned with the qualitative nature of the education to be provided.

The statutory goal to provide a "free appropriate education" must be viewed as one establishing the direc-

tion toward which the programs required by the statute should aim. To define that direction for the handicapped as one leading toward self-sufficiency is merely to acknowledge the obvious—that the severely and profoundly handicapped children in the plaintiff class do not possess substantial learning capacity along objective academic lines and therefore must be assisted in achieving the realistic educational objective available to them, that of reasonable self-sufficiency under their individual circumstances. Only when that statutory goal is acknowledged can Pennsylvania satisfactorily perform the individual evaluations required by the statute and the majority.

The narrow issue before the district court was whether Pennsylvania's rule limiting its annual education to 180 days as applied to the class of handicapped children who seriously regress when there are long interruptions in their education violates the congressional policy of requiring an "appropriate" education for such children. I would affirm the district court's holding that it does. An educational program which ignores the unique learning characteristics of this group of handicapped children denies them a reasonable opportunity to achieve the educational objectives intended by Congress.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 79-2158, 79-2188, 79-2189, 79-2190
79-2568, 79-2569, 79-2570

PATRICIA SUE BATTLE, by her parents and next friend JUNE E. BATTLE and DONALD E. BATTLE and JUNE E. BATTLE and DONALD E. BATTLE in their own right, on behalf of themselves and all others similarly situated

vs.

COMMONWEALTH OF PENNSYLVANIA, CARYL M. KLINE, Secretary of Education, Commonwealth of Pennsylvania, Department of Education

THE ABINGTON SCHOOL DISTRICT, DR. CARL B. HOFFMAN, Superintendent of the Abington School District,

THE WOODS SCHOOLS, DR. HAROLD S. BARBOUR, President of the Woods Schools,

(D.C. Civil No. 70-0132)

BERNARD, NATALIE, a minor, by her parents and natural guardians BERNARD, CLARA M. and BERNARD, ROBERT A. in their own right, on behalf of themselves and all others similarly situated

vs.

COMMONWEALTH OF PENNSYLVANIA, KLINE, CARYL, SECRETARY OF EDUCATION COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION,

THE MARPLE NEWTOWN SCHOOL DISTRICT, SANNER, GLENN Superintendent of the Marple Newtown School District,

ELWYN INSTITUTE CLARD, DR. GERALD R., President of the Elwyn Institute

(D.C. Civil No. 78-0133)

ARMSTRONG, Patricia and John individually and on behalf of their minor child, GARY ARMSTRONG and NORMA H., individually and on behalf of her minor child, RICHARD H., on behalf of themselves and all those similarly situated,

vs.

KLINE, Caryl, Secretary of Education of the Commonwealth of Pennsylvania, individually and in her official capacity,

THE SCHOOL DISTRICT OF PHILADELPHIA, MICHAEL MARCASE, individually and in his official capacity as Superintendent of the School District of Philadelphia and

ARTHUR W. THOMAS, MRS. EDWARD OBERHOLTZER, AUGUSTUS BAXTER, MRS. LAWRENCE BOONIN, ROBERT SEBASTIAN, MRS. MICHAEL STACK, GEORGE PHILIP STAHL, JR., and DR. NICHOLAS TROLIO, individually and in their official capacities as members of the Board of Education of the School District of Philadelphia

(D.C. Civil No. 78-0172)

Marple Newtown School District, a defendant in D.C. Civil No. 78-0133,
Appellant in No. 79-2158

Caryl Kline, a defendant in D.C. Civil Nos. 78-0132, 78-0133 and 78-0172,
Appellant in No. 79-2188

Abington School District, a defendant in D.C. Civil No. 78-0132,
Appellant in No. 79-2189

School District of Philadelphia, Michael Marcase, Arthur W. Thomas, Mrs. Edward Oberholtzer, Augustus Baxter, Mrs. Lawrence Boonin, Robert Sebastian, Mrs. Michael Stack, George Philip Stahl, Jr., and Dr. Nicholas Trolio, defendants in D.C. Civil No. 78-0172,
Appellants in No. 79-2190

Robert Scanlon, a defendant in D.C. Civil Nos. 78-0132, 78-0133, 78-0172
Appellant in Nos. 79-2568, 79-2569 and 79-2570

Appeal From the United States District Court
For the Eastern District of Pennsylvania

D.C. Civil Action Nos. 78-0132, 78-0133, 78-0172

Present: HUNTER, VAN DUSEN and SLOVITER, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on January 14, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the causes be, and the same are hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:
(s) Thomas F. Quinn
Clerk

July 15, 1980

10. ORDER (J. HUNTER) DENYING PETITION FOR REHEARING (Filed August 22, 1980)

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 79-2158/2188/2189/
79-2190/2568/2569/2570

PATRICIA SUE BATTLE, et al.,
Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Appellees,

and

NATALIE BERNARD, et al.,
Appellees,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

and

PATRICIA and JOHN ARMSTRONG v. ROBERT SCANLON, et al.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellant Scanlon in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circut in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(s) James Hunter, III
James Hunter, III,
Judge

Dated: August 22, 1980

(11) MEMORANDUM AND ORDER OF JUDGE NEWCOMER, October 27, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-172

PATRICIA ARMSTRONG, et al.

v.

CARYL KLINE, et al.

Civil Action No. 78-132

PATRICIA SUE BATTLE, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

Civil Action No. 78-133

NATALIE BERNARD, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

MEMORANDUM AND ORDER

Newcomer, J., October 27, 1980.

To qualify for federal assistance under the Education for All Handicapped Children Act, 20 U.S.C. §§1401-1420, a state must have in effect a policy which assures all handicapped children the right to a "free appropriate public education." §1412. The Act also establishes procedural safeguards with respect to the implementation of that right. §1415. The Commonwealth of Pennsylvania, prior to June 21, 1979, had established a policy and practice of refusing to fund the provision of education for any child, handicapped or not, in excess of 180 days per year. Five handicapped children and their parents instituted three class action suits alleging that the defendants' adherence to the 180 day limitation violated plaintiff childrens' constitutional and statutory rights. The actions were consolidated for trial on their common injunctive and declaratory issues.

On June 21, 1979, this Court found that the Commonwealth's 180 day rule violated the class's and named plaintiffs' right to a free appropriate public education under the Act. *Armstrong v. Kline,* 476 F. Supp. 583, 605 (E.D. Pa. 1979).[1] Injunctive relief was granted to class members in Remedial Orders No. 1 and 2, entered August 1 and September 5, 1979, respectively, and to the named plaintiffs in Orders dated July 5 and July 17, 1979.

Defendants sought interlocutory review of the judgment, and on July 15, 1980 the Court of Appeals issued its opinion. *Battle v. Commonwealth,* C.A. No. 79-2158

[1] The Court did not reach the question of whether the 180 day rule violated plaintiffs' constitutional rights.

(3d Cir. July 15, 1980). Although it essentially agreed with this Court that the 180 day limitation violated the Act, the Court of Appeals based its conclusion on different reasoning. As a result, the case was remanded for consideration of whether any of the remedial orders required modification. In the interim, such orders were to remain in effect. Defendant Scanlon has filed a motion to vacate all of this Court's remedial orders. For reasons discussed below, the Motion will be denied.

Discussion

In ruling on the validity of the 180 day rule, this Court focused on the content to be given the phrase "free appropriate public education." We found in the Act's definition of "special education," one of the components of an appropriate education, and emphasis on meeting the "unique needs" of the handicapped child. Recognizing that "needs arise in [the] context of achieving certain ends, and surely there are certain ends, and not others, that are the concern of this legislation," we turned our inquiry to the goals of the education that states are required to provide under the Act. Although we found no explicit guidance in the Act, we found throughout the legislative history an express intent to "provide for that education which would leave these children, upon school's completion, as independent as possible from dependency on others, including the state, within the limits of the handicapping condition." 476 F. Supp. at 604. Coupled with our factual finding that "for some SPI and SED children, including the named plaintiffs, interruptions in programming, because of regression and the length of time it takes to regain lost skills and behaviors, render it impossible or unlikely that they will attain that state of self-sufficiency that they could otherwise reasonably be ex-

pected to reach," *Id.* at 597, this legal conclusion led us to hold that the inflexible 180 day limitation on education violated the Act.

In its opinion the Court of Appeals disagreed with this Court's holding that the Act provides specific educational goals for handicapped children. It found instead that "states are responsible in the first instance for setting reasonable educational objectives and reasonable means for achieving these objectives." Slip. Op. at 24. This conclusion was based on several factors: the Act's relative silence on the question of educational goals, the tradition of local autonomy in the areas of resource allocation and educational policy, and the responsibility which the Act places on state agencies in formulating individualized educational programs (IEP) and insuring compliance with the Act. Although the Court of Appeals agreed the legislative history indicated a concern with increased self-sufficiency, it found the history should merely provide guidance to the states in the formulation of educational goals rather than be determinative of the goals in and of itself. The Court also indicated the legislative history pointed only to a concern with increased self-sufficiency whereas the standard enunciated by this Court mandated maximization of self-sufficiency. *Id.* at 23-24, n. 11.

Having concluded states bear the initial responsibility for formulating reasonable educational objectives and reasonable means for achieving those objectives, the Court of Appeals determined the Act placed two restrictions on the states in these areas: review and approval by the Commissioner of Education and detailed procedures for the formulation of IEPs. *Id.* at 24. It found the Commonwealth's 180 day rule conflicted with both of these provisions.

The Court of Appeals agreed with this Court that the Act's focus on the "unique needs" of the handicapped child mandates consideration of the individual needs of each handicapped child. It noted the statutory requirement of the formulation of an IEP for each child further underscored the Act's emphasis on the individual and found this emphasis to be especially necessary in view of the wide variety of handicapping conditions covered by the Act. An inflexible policy such as the Commonwealth's 180 day rule, which precludes this individualized consideration, is incompatible with this aspect of the Act and must fall. In addition, the Court found the rule to be invalid because it had not been "filtered" through the Commissioner of Education and the general public. *Id.* at 25-27.

With this guidance in mind, the Court turns to the question of whether the Orders issued pursuant to our June 21, 1979 ruling must be modified or vacated. Because the Court of Appeals held that states are in the first instance charged with the responsibility for establishing education goals, defendant Scanlon urges the Court to vacate all Orders entered in this action until the Commonwealth has developed such goals in cooperation with the Commissioner of Education. This we decline to do.

As an initial matter we note the Court of Appeals expressly found the 180 day rule to be invalid under the Act, regardless of how promulgated and regardless of the existence or lack of any state policy, due to its preclusion of individualized consideration. Contrary to defendant Scanlon's assertion, we find nothing in the Court of Appeals ruling which would indicate the 180 day rule might be found "as acceptable means of allocating scarce re-

sources."[2] As defendant Scanlon correctly argues, the Court of Appeals was concerned that states not be precluded from articulating educational policies predicated on reasonably conceived goals; however, because *no* state policy incorporating the 180 day rule could be found valid under the Act, plaintiffs are entitled to immediate relief from the illegal rule. In short, the Court of Appeals and this Court agreed that the 180 day rule was invalid but disagreed as to the source of the standard to be used in determining which children are entitled to education in excess of 180 days.

The Court has concluded that none of the remedial orders require modification. This conclusion is based on the Court's finding that the Commonwealth has adopted and secured approval of a policy, as required by the Act, which is equivalent to that utilized in the Court's June 21, 1979 decision and subsequent remedial orders. In the Program Plan for Fiscal Year 1978 the Department of Education referred to 22 Pa. Code §13.2 as the state policy fulfilling the requirement that each state have in effect a "policy that assures all handicapped children the right to a free appropriate public education." Each sub-

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[2] While the Court of Appeals acknowledged that "hard decisions of resource allocation" are best left to the states in the first instance it did not indicate states were allowed unbridled discretion in this area when competing interests come into play. For example, the Court cited with approval Mills v. Board of Education, 348 F. Supp. 866, 876 (D.D.C. 1972), which stated that the burden of inadequate funding "cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." Slip. Op. at 21. Similarly, the Commonwealth cannot employ an inflexible approach such as the 180 day rule as a means of allocating resources because to do so would violate the handicapped child's right to individualized consideration.

sequent plan has likewise incorporated this policy and has been approved by the Commissioner of Education. The section states as follows:

> 13.2 Purpose
>
> (a) The general provisions of this Chapter shall provide the basis for early identification and evaluation of all exceptional persons and for planning, developing, and operating special education programs and services. It shall be the policy of the Board, through the Secretary of Education, to provide exceptional school-aged persons with quality special education programs and services which will *ultimately enable them to participate as fully as possible in appropriate activities of daily living.*

This Court recognizes that the Court of Appeals has determined that the state's role in the first instance is to formulate reasonable educational goals; however, we are unable to discern any substantive differences between the policy articulated by the State in Section 13.2—"enable them to participate as fully as possible in appropriate activities of daily living"—and that formulated by this Court—"as independent as possible from dependency on others."[3] We therefore conclude that no modification of the Orders entered is necessitated by the Court of Appeals ruling. The Commonwealth is, of course, free to promulgate new

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[3] This standard is, of course, not meant to establish an absolute goal for the individual student's development, or the state's resource allocation. We believe that the state's responsibility under the Act is simply to provide "a free appropriate education" as the term has, in the first instance, been defined by the Commonwealth, and later by this Court, and to do so in the context of the state's reasonable evaluation of its budgetary resources.

policies within the confines of the Court of Appeals ruling; in the absence of such policies, however, the Court believes the existing remedial orders should remain intact.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-172

PATRICIA ARMSTRONG, et al.
v. CARYL KLINE, et al.

Civil Action No. 78-132

PATRICIA SUE BATTLE, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

Civil Action No. 78-133

NATALIE BERNARD, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, to wit, this 27th day of October, 1980, upon consideration of defendant Scanlon's Motion to Vacate, it is hereby Ordered that the Motion is DENIED.

AND IT IS SO ORDERED.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

(12) RELEVANT STATUTORY PROVISIONS

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20 U.S.C.

SUBCHAPTER I—GENERAL PROVISIONS

§1401. Definitions

As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

* * *

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including

classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-

term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles. Pub. L. 91-230, Title VI, §602, Apr. 13, 1970, 84 Stat. 175; Pub. L. 94-142, §4(a), Nov. 29, 1975, 89 Stat. 775.

* * *

§1411. Entitlements and allocations

Formula for determining maximum State entitlement

(a) (1) Except as provided in paragraph (3) and in section 1419 of this title, the maximum amount of the grant to which a State is entitled under this subchapter for any fiscal year shall be equal to—

(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;

multiplied by—

(B) (i) 5 per centum, for the fiscal year ending September 3, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this subchapter for the fiscal year ending September 30, 1977.

(2) For the purpose of this subsection and subsection (b) through subsection (e) of this section, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to number of such children receiving spe-

cial education and related services on December 1 of the fiscal year preceding the fiscal year for which the determination is made.

(4) For purposes of paragraph (1) (B), the term "average per pupil expenditure", in the United States means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(5) (A) In determining the allotment of each State under paragraph (1), the Commissioner may not count—

(i) handicapped children in such State under paragraph (1) (A) to the extent the number of such children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State; and

(ii) handicapped children who are counted under section 241c-1 of this title.

(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

Distribution and use of grant funds by State for fiscal year ending September 30, 1978

(b) (1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1978—

(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 1412 (3) of this title.

(2) Of the funds which any State may use under paragraph (1) (A)—

(A) an amount which is equal to the greater of—

(i) 5 per centum of the total amount of funds received under this subchapter by such State; or

(ii) $200,000;

may be used by such State for administrative costs related to carrying out sections 1412 and 1413 of this title;

(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 1412 (3) of this title.

Distribution and use of grant funds by States for fiscal years ending September 30, 1979, and thereafter

(c) (1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 1412(3) of this title.

(2) (A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1) (A)—

(i) an amount which is equal to the greater of—

(I) 5 per centum of the total amount of funds received under this subchapter by such State; or

(II) $200,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 1412 and 1413 of this title; and

(ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 1412(3) of this title.

(B) The amount expended by any State from the funds available to such State under paragraph (1) (A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

(3) The provisions of section1413(a) (9) of this title shall not apply with respect to amounts available for use by any State under paragraph (2).

(4) (A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State of—

(i) such local educational agency or intermediate educational unit is entitled, under subsection (d) of this section, to less than $7,500 for such fiscal year; or

(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 1414 of this title.

(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local eductional agency or such intermediate educational unit. The provisions of paragraph (2) (B) shall not apply to the use of such funds.

Allocation of funds within States to local educational agencies and intermediate educational units

(d) From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b) (1) (B) or subsection (c) (1) (B) of this section, as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b) (1) (B)

or subsection (c) (1) (B) of this section, as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this subchapter.

* * *

Reductions or Increases

(g) (1) If the sums appropriated for any fiscal year for making payments to States under this subchapter are not sufficient to pay in full the total amounts which all States are entitled to receive under this subchapter for such fiscal year, the maximum amounts which all States are entitled to receive under this subchapter for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available

to the local educational agency or intermediate educational unit, under the provisions of subsection (d) of this section, which it estimates that it will expend in accordance with the provisions of this subchapter. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this subchapter, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs. Pub. L. 91-230, Title VI, §611, Apr. 13, 1970, 84 Stat. 178; Pub. L. 93-380, Title VI, §614 (a), (e) (1), (2), Aug. 21, 1974, 88 Stat. 580, 582; Pub. L. 94-142, §§2 (a) (1)-(3), 5 (a), (c), Nov. 29, 1975, 89 Stat. 773, 776, 794.

As amended Pub. L. 95-561, Title XIII, §1341 (a), Nov. 1, 1978, 92 Stat. 2364.

§1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413 (b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which

will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417 (c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414 (a) (5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that

education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as to not be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

Pub.L. 91-230, Title VI, §612, Apr. 13, 1970, 84 Stat. 178; Pub.L. 92-318, Title IV, §421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub.L. 93-380, Title VI, §§614(b), (f)(1), 615(a), Title VIII, §843(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub.L. 94-142, §§2(a)(4),(c), (d), 5(a), Nov. 29, 1975, 89 Stat. 773, 774, 780.

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§1413. State plans

Requisite features

(a) Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall—

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 241c-1 of this title, section 844a(b)(8) of this title or its successor authority, and section 1262(a)(4)(B) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner con-

sistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this chapter, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children, significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that (i) handicapped children in private schools and facilities will be provided special educa-

tion and related services (in conformance with an individualized educational program as required by this subchaper) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411 (a) or 1411 (d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this subchapter, and (B) keeping such records and affording such access thereto as the Commis-

sioner may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in

meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 1417 of this title; and

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and (C) assist the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 1418 of this title.

Additional assurances

(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this

title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

Notice and hearing prior to disapproval of plan

(c) The Commissioner shall approve any State plan and any modification thereof which—

(1) is submitted by a State eligible in accordance with section 1412 of this title; and

(2) meets the requirements of subsection (a) and subsection (b) of this section.

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

Pub.L. 91-230, Title VI, §613, Apr. 13, 1970, 84 Stat. 179; Pub.L. 93-380, Title VI, §§614(c), (d), 615(b), (c), Title VIII, §843(b)(2), Aug. 21, 1974, 88 Stat. 581, 583, 611; Pub.L. 94-142, §§2(b)(3), 5(a), Nov. 29, 1975, 89 Stat. 774, 782.

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§1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are

guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b) (1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child, whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the par-

ents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by

counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub.L. 91-230, Title VI, §615, as added Pub.L. 94-142, §5(a), Nov. 29, 1975, 89 Stat. 788.

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§1416. Withholding of payments; judicial review

(a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and (B) may, after notifying the

State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b)(1) If any State is dissatisfied with the Commissioner's final action with respect to its State plan sub-

mitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of Title 28.

(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

Pub. L. 91-230, Title VI, §616, as added Pub. L. 94-142, §5 (a), Nov. 29, 1975, 89 Stat. 789.

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